

COMPREHENSIVE MASTER SERVICES AGREEMENT

BY AND BETWEEN

THE COMMONWEALTH OF VIRGINIA

AND

IBM

DRAFT
August 5, 2005

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Schedule 2.3.....	Procedures Manual [To be developed by the Parties]
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Schedule 6.1.....	Key Personnel [To be provided as part of Vendor's Detailed Proposal]
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Schedule 10.....	Commonwealth Policies [To be developed by the Parties]
Schedule 14.1.....	Reports [To be developed by the Parties]
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COMPREHENSIVE MASTER SERVICES AGREEMENT

This Comprehensive Master Services Agreement, dated as of [_____] , 2005, is a contract by and between the Commonwealth of Virginia (the "Commonwealth") acting through the Virginia Information Technologies Agency ("VITA"), and [_____] ("Vendor"), a [_____] corporation], having a principal place of business at [_____] , under which Vendor shall provide the Commonwealth with certain IT- and business process-related consulting and professional services on the terms and conditions set forth below.

For and in consideration of the mutual promises and covenants contained herein, the receipt, sufficiency, and adequacy of which are hereby acknowledged, the Parties, intending to be legally bound, hereby contract and agree as follows:

1. BACKGROUND AND PURPOSE

1.1 The Commonwealth's Objectives

The Commonwealth has undertaken a business process re-engineering and re-solutioning initiative (to include system modernization), the initial goal of which is to identify areas of the Commonwealth's operations that could be significantly improved by undertaking an enterprise-wide re-engineering and re-solutioning of the business processes of such areas. The Commonwealth therefore desires to engage a service-provider to provide a broad range of IT- and business process-related consulting and professional services related to the investigation and analysis of certain of the Commonwealth's operations and the identification and development of detailed recommendations to the Commonwealth regarding which areas to re-engineer and the manner in which such areas should be re-engineered and re-solutioned. In addition, the Commonwealth desires to establish terms and conditions pursuant to which, if the Commonwealth so elects, the Commonwealth may engage Vendor to implement any or all of such recommendations. Vendor acknowledges and agrees that the Commonwealth has entered into this Agreement in order to achieve the general objectives identified above in this Section and the following:

- (i) Improve the Commonwealth's services to citizens and businesses;
- (ii) Enable the Commonwealth to become a more effective business partner;
- (iii) Achieve re-engineering benefits that are visible and experienced by the Commonwealth's employees and contractors;
- (iv) Reduce operational risk of the Commonwealth's operations;
- (v) Significantly improve the use and efficiency of the Commonwealth's employees and contractors;
- (vi) Achieve significant annual return on investments and reduction in the Commonwealth's costs;

- (vii) Improve revenue generation for the Commonwealth; and
- (viii) Improve the performance of the Commonwealth's operations and the ability to measure that performance and establish accountability.
- (ix) Permit the Parties to have a mutually beneficial financial relationship

The Parties agree that ambiguous or unclear terms are to be construed in a manner consistent with these objectives.

1.2 Proposals

Vendor has represented that it is a competent, qualified, experienced provider of IT- and business process-related consulting and professional services of the types required by the Commonwealth, has advised the Commonwealth that it could fulfill and fully satisfy the Commonwealth's requirements for such services, and has set forth details of how it would do so, in its proposal dated [_____, 200_], and certain other related documents, attached hereto as Schedule [1.2](#) (collectively, the "Proposals").

1.3 Engagement

In reliance upon such representations of Vendor and the Proposals, as described in Section [1.2](#), and in furtherance of the purposes for which the Proposals were submitted, the Commonwealth hereby engages Vendor to perform all of the Services and other obligations of Vendor that are described in this Agreement, and Vendor hereby accepts such engagement, upon the terms and conditions set forth herein. Vendor shall be the prime contractor and, subject to the terms and conditions hereof, hereby assumes full and total responsibility for obtaining and providing all Software, hardware, documentation, services, and other equipment and resources (other than those resources expressly identified herein as resources to be supplied by the Commonwealth) necessary and appropriate for it to perform the Services and to provide the Deliverables in accordance with this Agreement. In performing such Services and providing such Deliverables, Vendor shall be subject to the exercise of the Commonwealth's management and oversight functions and prerogatives, and authorities, and the Commonwealth's retained responsibilities, as described in this Agreement.

1.4 Approval by the Commonwealth

From the date that Vendor executes this Agreement (the "Signing Date") until such time as the Commonwealth executes this Agreement (the "Effective Date"), **which in no event shall be no later than December 31, 2005**, this Agreement constitutes the irrevocable, firm offer by Vendor to provide the Services to the Commonwealth for the Fees, in accordance herewith. This Agreement shall not be binding or of any legal force or effect on the Commonwealth until the authorized execution of this Agreement by the Commonwealth. Notwithstanding the foregoing, from the Signing Date until such time as the Commonwealth executes this Agreement, Vendor shall actively continue planning and working with the

Commonwealth to support the timely completion of all tasks necessary for the commencement of the Services.

2. SERVICES

2.1 Available Services

Vendor shall perform all of the Services, and provide the Deliverables, to and for the benefit of the Commonwealth, in accordance with the terms of this Agreement and as further described in a Statement of Work.

2.1.1. Definition of Services

As used herein, “Services” means any or all of the following:

(i) The provision of Vendor’s personnel, its expertise and the professional, consulting, technical and project management services necessary and appropriate to, as set forth in and subject to the assumptions contained in a Schedule or Statement of Work, fully complete all tasks, services, and functions necessary to (a) fully investigate and analyze the Functional Areas, (b) identify which Functional Areas could be significantly improved by undertaking an enterprise-wide re-engineering of the business processes of such Functional Areas, and (c) develop detailed and complete recommendations regarding the manner in which Functional Areas should be re-engineered and the priority or timeline for the re-engineering efforts of such Functional Areas (collectively, the “Analysis Services”);

(ii) The provision of Vendor’s personnel, its expertise and the professional, consulting, technical and project management services necessary and appropriate to, as set forth in and subject to the assumptions contained in a Schedule or Statement of Work, fully complete all tasks, services, and functions necessary to (a) fully implement the recommended enterprise-wide re-engineering of the business processes of such Functional Areas provided pursuant to the Analysis Services, and (b) manage, supervise and otherwise coordinate the implementation by the Commonwealth or another third-party service provider of the enterprise-wide re-engineering of the business processes of Functional Areas recommended pursuant to the Analysis Services (collectively, the “Implementation Services”);

(iii) Any of the other services described in Section [2](#) or elsewhere in this Agreement and the associated Schedules,

(iv) All tasks and services that are incidental, and necessary, to and for the performance of any of the Services (or the use thereof), or any of the other services described in Section [2](#) or elsewhere of this Agreement and the associated Schedules, exclusive, however, of services or functions for which the Commonwealth expressly retains responsibility hereunder.

Although the Parties have attempted in this Section [2](#) and elsewhere of this Agreement and the associated Schedules to delineate the specific services to be provided by Vendor, the Parties acknowledge that some items may not have been

specifically identified herein. The specific enumeration in any particular Section of this Agreement of certain of Vendor's duties or obligations is not an implied limitation on, or alteration of, other duties or obligations imposed on Vendor elsewhere in this Agreement. In the event of any dispute between the Parties as to whether a particular service or function falls within the scope of the services to be provided by the Commonwealth's third party service-providers, or by the Commonwealth itself, or within the scope of those to be provided by Vendor, such particular service or function shall be considered to be a part of the Services hereunder if it is described by clauses (i), (ii), (iii), or (iv) above 2.1.2.

Performance of Services

Vendor shall perform all of the Services, and provide the Deliverables, to and for the benefit of the Commonwealth, in accordance with the terms of this Agreement and the applicable Statements of Work, including the provisions of this Section 2, and all Schedules and Exhibits hereto, and with all performance standards, Critical Milestones, timetables, and deadlines set forth therein. If not otherwise provided in this Agreement, with respect to any tasks, functions, and services that are within the scope of Services but with regard to which there is no set or fixed timetable or schedule for performance and which are specified to be provided upon the Commonwealth's request, Vendor shall promptly perform such Services, or provide the appropriate Deliverables, pursuant to the Change Management Procedure Vendor shall at all times use all commercially reasonable efforts (which, at a minimum, shall be consistent with industry standards and practices for tier 1 service providers) designed to avoid, prevent, and mitigate any material adverse effect on the continuity and quality of the Services being provided to the Commonwealth. Except as expressly set forth in this Agreement, Vendor shall furnish all labor, materials, equipment, products, tools, transportation, and supplies required to perform the Services, operate and support and maintain the Systems, and provide the Deliverables. At all times during the Term, upon request from the Commonwealth and upon termination of this Agreement or the applicable Statement of Work, Vendor shall provide immediately to the Commonwealth the then-current version of any Deliverable related to, or produced in connection with, this Agreement in Vendor's possession that the Commonwealth is entitled to possess.

2.2 Statements of Work

2.2.1. General

Vendor shall perform all Services and shall provide all Deliverables in accordance with a Statement of Work, as such, Services, responsibilities, and obligations may be modified, supplemented, and enhanced during the Term, pursuant to the Change Management Procedure and in accordance with the governance model set forth in Schedule 4.3. For purposes of this Agreement, a "Statement of Work" means a written document entered into pursuant to, and incorporating the terms of, this Agreement signed by both Parties that sets forth, with respect to a specific project, the following elements (as applicable): the start date, location and scheduled completion date, a description of the project, the Services and the Deliverables, responsibilities of each Party, the fees and payment schedule, Service Levels, Critical Milestones and/or other assessment points, all Key Personnel, specifications, implementation plans and time schedules, completion and Acceptance Criteria and Acceptance Test Procedures, and such other or different

information as may be agreed upon by the Parties and any modifications of the terms of the Agreement as they apply to the Statement of Work. In the event of a conflict between a signed Statement of Work and the provisions of this Agreement, the Statement of Work shall take precedence only as to the project described therein and only to the extent the provisions of the Statement of Work expressly state that it takes precedence and only if the Statement of Work is executed and delivered by an authorized signatory of each Party.

2.2.2. Initial Statement of Work

The initial Statement of Work under this Agreement is attached hereto as Schedule [2.2](#). Vendor shall provide Services under the initial Statement of Work in two phases: Phase 1 shall consist of the Analysis Services, and Phase 2 shall consist of the Implementation Services. The Phase 1 Analysis Services shall be provided in accordance with the service descriptions and timelines contained in Schedule [2.2](#). The Phase 2 Implementation Services shall be provided in accordance with written service descriptions and timelines mutually agreed to by the Parties during the course of Phase 1. Both the Phase 1 Analysis Services and the Phase 2 Implementation Services shall be provided in accordance with, and without exceeding, the Fees set forth in Schedule [2.2](#).

2.2.3. Additional Statements of Work

The Commonwealth may at any time, and from time to time, request that Vendor perform additional services for the Commonwealth pursuant to the Change Management Procedure. Within a reasonable period (not to exceed ten (10) business days) after receiving such a request from the Commonwealth, Vendor shall prepare and submit to the Commonwealth a written draft Statement of Work that: (i) if applicable, assesses the expected impact of such request on any Services or Deliverables then being provided hereunder; (ii) defines and describes how Vendor would fulfill or satisfy such request, and describes any additional Services and Deliverables to be provided by Vendor pursuant thereto in reasonable detail; (iii) sets forth pricing, specifications, implementation plans and time schedules, with appropriate milestone and completion dates, anticipated by Vendor in connection with fulfilling such request; (iv) contains proposed completion and acceptance criteria; and (v) sets forth any other information required by this Agreement to be in a Statement of Work. No additional Statement of Work shall be binding upon the Commonwealth or Vendor unless executed and delivered by an authorized signatory of such Party. All additional Statements of Work shall be governed by the terms and conditions of this Agreement unless the Statement of Work expressly states that it takes precedence over this Agreement.

2.3 Procedures Manual

Within ninety (90) days after the Effective Date, Vendor shall develop to the satisfaction of the Commonwealth, a Procedures Manual applicable to all of the Services, except that, to the extent any portions of the Procedures Manual are developed prior to the expiration of such ninety (90) day period, Vendor shall deliver such portions to the Commonwealth as soon as they are so developed. The Procedures Manual shall address each of the items described in Schedule [2.3](#) hereto. The Commonwealth reserves the right to identify (at any time, and from

time to time, during the Term) and notify Vendor of such other items, in addition to those listed in Schedule [2.3](#), that the Commonwealth may deem appropriate for inclusion in the Procedures Manual, subject to the Change Management Procedure. At least thirty (30) days prior to each anniversary of the Effective Date, Vendor shall revise the Procedures Manual as appropriate to reflect any changes to the Commonwealth's IT and business process environment, or related requirements, and submit such revised Procedures Manual to the Commonwealth for review, comment, and approval. The Procedures Manual excluding any pre-existing information, documentation or materials of Vendor or its Subcontractors and derivatives of the foregoing, shall be owned by the Commonwealth.

2.4 Service Levels

Vendor shall perform all Services at levels of accuracy, quality, completeness, timeliness, responsiveness and resource efficiency that are equal to or better than the Service Levels (if any) set forth in the applicable Statement of Work or (b) in the event that a Service Level is not specified, the accepted industry norms applicable to the performance of such Services by top tier service providers. Vendor shall be responsible for meeting or exceeding the applicable Service Levels even where doing so is dependent on the provision of Services by Subcontractors. The detailed Service Level methodology applicable to the Service Levels under a given Statement of Work shall be set forth therein. Vendor shall implement measurement and monitoring tools and produce the metrics and reports necessary to measure its performance against the Service Levels and shall deliver to the Commonwealth such reports in accordance with the frequency set forth in the applicable Statement of Work. Upon request in connection with an audit, and at no additional charge to the Commonwealth, Vendor shall provide the Commonwealth or its designees with information and access to tools and procedures used to produce such metrics in a form that is prescribed by the Commonwealth in its sole discretion.

2.5 Root Cause Analysis and Resolution

2.5.1. Process

Upon Vendor's discovery of, or, if earlier, Vendor's receipt of a notice from the Commonwealth in respect of, (i) Vendor's failure to meet a Critical Milestone, or (ii) Vendor's failure to provide the Services in accordance with this Agreement, Vendor shall promptly, perform a root cause analysis designed to identify the cause of such failure and (a) in the case of a failure described in clause (i) above, attempt to complete all work and activities associated with such Critical Milestone, (b) in the case of a failure described in clause (ii) above, attempt to correct such failure (caused by Vendor), and (c) provide the Commonwealth with a written report describing in detail the cause of, and activities designed for correcting, such failure. The correction of any such failure shall be performed entirely at Vendor's expense unless Vendor did not cause the failure.2.5.2.

Resolving Disputes

In the event of any dispute as to whether a particular defect, malfunction, or other difficulty was caused by products or Services furnished by Vendor or by products or

services furnished by any third-party provider of the Commonwealth Resources, then Vendor may perform a root cause analysis, as described in Section [2.5.1](#), soliciting input from the Commonwealth, and the involved third parties, as appropriate. Vendor may promptly share the report of such analysis with the Commonwealth and involved third parties in a good faith effort to resolve any such dispute. If the dispute is not so resolved, then such dispute shall be handled in accordance with the dispute-resolution principles set forth in Section [21](#) of this Agreement.

2.5.3. Pending Disputes

Unless otherwise directed by the Commonwealth, and notwithstanding the pendency of any dispute or root cause analysis as to the cause of a defect, malfunction, or difficulty, Vendor shall take prompt and reasonable steps designed to correct such defect, malfunction, or difficulty. To the extent that it is determined, based on the results of the root cause analysis, that Vendor or Vendor's Subcontractors, or any products or services furnished by Vendor, were responsible for such defect, malfunction, or other difficulty, such correction will be at Vendor's cost. To the extent that it is determined, based on the results of the root cause analysis, that any party or parties other than Vendor or Vendor's Subcontractors were responsible for such defect, malfunction, or other difficulty, such correction will be at the Commonwealth's cost, and the Commonwealth and Vendor shall negotiate in good faith a fair amount to be paid to Vendor for Vendor's corrective activities.

2.6 Viruses; Disablement

Vendor shall use industry practices regularly designed to identify, screen, and prevent any Disabling Device in resources utilized by Vendor in connection with the provision of the Services and Deliverables and shall not itself knowingly or intentionally install (and shall prevent its Subcontractors from installing) any Disabling Device in resources utilized by Vendor, the Commonwealth, or any Subcontractor, in connection with the provision or receipt of the Services. A "Disabling Device" is a virus, timer, clock, counter, time lock, time bomb, procedure, or other limiting design, instruction, or routine that would erase data or programming or cause any resource to become inoperable, substantially compromised so as to prevent operability, or otherwise incapable of being used in the full manner for which such resource was intended to be used other than code which is inserted into commercially available products to ensure that the purchaser or licensee uses the product in accordance with the license agreement, subject to the Change Management Procedure. Vendor shall assist the Commonwealth in reducing and mitigating the effects of any Disabling Device discovered in any resource related to the provision or receipt of the Services, especially if such Disabling Device is causing a loss of operating efficiency or data.

2.7 ISO 9000 Standards

Vendor shall utilize procedures and processes that are consistent with ISO 9000 certification (or such similar certification class as shall succeed ISO 9000, as applicable) with respect to its provision of the Services. 2.8 Non-Exclusivity

Subject to the provisions set forth in Schedule 2.2 nothing herein shall (1) prevent the Commonwealth from providing for itself or obtaining from any third party, at any time during the Term or thereafter, the Services or the Deliverables, or any type of products or services in any way analogous, similar, or comparable to the Services or the Deliverables, as applicable, or any other products or services or. (2) be construed or interpreted as limiting the Commonwealth's right or ability during the Term to increase or decrease its demand for Services hereunder. In the event that the Commonwealth elects to provide for itself (or engage third parties to provide for it) any services not provided under this Agreement, Vendor shall provide to the Commonwealth, or its chosen service-provider, reasonable cooperation, assistance, and access, as necessary, to facilitate the coordination with such other services with the Services and the Deliverables, subject to the Change Management Procedure.

2.9 Location of Performance

Except where Vendor obtains the Commonwealth's prior written approval, or as otherwise specified in this Agreement, Vendor shall perform most of the Services only from or at locations within the geographic boundaries of the Commonwealth. The Commonwealth acknowledges that many Vendor personnel delivering Services to the Commonwealth may travel regularly between their home locations and Commonwealth work locations and accordingly may perform Services from time to time from their home IBM office or home locations outside the geographic boundaries of the Commonwealth.

3. COMMONWEALTH RESPONSIBILITIES

3.1 Assigned Tasks

The Commonwealth agrees to perform all tasks specifically and expressly assigned to it in the main body of this Agreement or in a Statement of Work, and may, in its discretion, use other contractors or subcontractors to perform any such task, provided that the Commonwealth shall be responsible for the management and direction of other contractors and subcontractors and that the Commonwealth shall remain liable for all such Services .

3.2 Provision of Resources

The Commonwealth shall make available at no charge, to Vendor Personnel and Vendor's Subcontractors such reasonably unencumbered access to Commonwealth facilities, premises, assets and other resources as expressly designated and specified in a Statement of Work and only to the extent reasonably necessary and appropriate for such Vendor Personnel and Vendor Subcontractors to perform the Services and perform Vendor's obligations under this Agreement. The Commonwealth also shall provide Vendor with reasonable access to the Commonwealth's

personnel as necessary and appropriate for Vendor to fulfill its obligations under this Agreement.

4. Relationship management The Commonwealth agrees to provide reasonable work space, administrative support, computer facilities and other support, each as may be described more particularly in a Statement of Work, which are necessary to perform the Services under a Task Order. Client agrees to perform in a timely fashion those tasks and provide the personnel agreed to by the parties and set forth in a Statement of Work. .

4.1 Status Reports

Periodically during the Term of this Agreement, but not less frequently than once every two weeks, Vendor shall deliver to the Commonwealth's Relationship Manager a written report summarizing the progress of the Services during the preceding month, including problems that have occurred and could delay Vendor's performance of anticipated activities and expected problems during the upcoming month (each such report, a "Status Report"). At a minimum, each Status Report shall include: (i) the current and complete status and progress of the performance of the Services, and an assessment of how such status and progress compares to the Critical Milestones, and any other schedules or deadlines set forth in the Statements of Work; (ii) any actual delays; (iii) any reasonably anticipated delays; (iv) any failures, or correction of any failures, with regard to which Vendor is performing, or has performed, a root cause analysis, as described in Section [2.5](#); and (v) such other information as the Commonwealth may reasonably request from time to time, subject to the Change Management Procedure Notwithstanding the foregoing, Vendor shall promptly notify the Commonwealth's Relationship Manager, in writing, in the event that Vendor is materially obstructed or delayed in its performance of the Services, or the operation, support, or maintenance of the Systems, by any act, omission, or delay caused by the Commonwealth or its agents or employees, including any delay or failure by the Commonwealth to perform any of its obligations under this Agreement or Statement of Work. Promptly after any such notification, the Parties shall confer and mutually agree upon any appropriate extension of the time period in which Vendor must complete the affected Services, in accordance with the governance procedures described in Schedule [4.3](#).

4.2 Status Meetings

During the Term, representatives of the Parties shall meet periodically as set forth in Schedule [4.3](#) or as requested by the Commonwealth to discuss matters arising under this Agreement. Each Party shall bear its own costs in connection with the attendance and participation of such Party's representatives in such meetings. The place and time, and whether to meet via teleconference or in person, shall be as determined by the Commonwealth (or as otherwise mutually agreed upon by the Parties).

4.3 Governance Model

The Parties will manage their relationship under this Agreement using the governance model in Schedule [4.3](#).

4.4 Critical Milestones

4.4.1 General

[Note – this is not applicable given the way in which the SOW's are being proposed by Vendor]

5. ACCEPTANCE TESTING

5.1 General

Changes to the Services which may require acceptance testing shall be provided to the Commonwealth by Vendor in conformity with all requirements, Specifications, Acceptance Criteria, and time schedules set forth or referenced in this Agreement and the applicable Statement of Work. Vendor shall where appropriate and agreed upon utilize complete and thorough Acceptance Testing Procedures, and appropriate Acceptance Criteria, all of which shall be subject to review and approval by the Commonwealth, and no such activities shall be deemed completed until all Acceptance Criteria, have been successfully met. Vendor shall provide the Commonwealth with written notification when each Deliverable is ready for such review and testing. The procedures to be used by the Commonwealth in reviewing, and determining whether to accept or reject, any such change shall be set forth in the Procedures Manual.

5.2 Acceptance of Documentary Deliverables

The Commonwealth shall have the right to review, comment and approve each documentary Deliverable (or any portion or component thereof) provided by Vendor to the Commonwealth hereunder, in accordance with the Procedures Manual. Vendor shall provide draft materials and solicit Commonwealth's input sufficiently in advance of any Critical Milestone or other deadline set forth in the applicable Statement of Work so as to facilitate meeting each such Critical Milestone or other deadline. Vendor shall revise the documentary Deliverable so as to correct any deficiencies or address other changes or comments submitted to Vendor by the Commonwealth with respect to a documentary Deliverable and resubmit such documentary Deliverable to the Commonwealth for further review. Vendor shall submit a proposed final copy of each documentary Deliverable (in suitable electronic and paper format) to the Commonwealth by no later than the applicable Critical Milestone or other deadline for such Deliverable. Upon receiving the final documentary Deliverable from Vendor, the Commonwealth shall commence reviewing such documentary Deliverable (unless otherwise provided, for a period of time not to exceed twenty-one (21) consecutive calendar days) to determine whether such Deliverable conforms to the applicable Acceptance Criteria, and whether the Commonwealth shall accept or reject such Deliverable. If the Commonwealth determines that such Deliverable does not conform to such Acceptance Criteria, the Commonwealth shall deliver to Vendor a written report describing the deficiencies in reasonable detail. Vendor shall correct any such deficiencies within fifteen (15) calendar days after receiving any such report and shall notify the Commonwealth in writing when such corrections are completed. The Commonwealth may then review the corrected Deliverable for up to fifteen (15) additional

consecutive calendar days, at the end of which the determination, notification, and correction process described above in this Section [5.2](#) shall be repeated.

5.3 Acceptance of Software

5.3.1. Pre-Live Acceptance

Upon the Commonwealth's receipt of written notification that Vendor has completed the installation of Software and that the same is ready for testing, the Commonwealth shall begin testing such Software in a non-live environment within seven (7) calendar days using a mutually agreed to test plan and the Acceptance Test Procedures, to determine whether the same performs in accordance with the Acceptance Criteria. In addition, Vendor shall provide to the Commonwealth all reasonably requested information and documentation regarding Vendor's own internal test plans and test results with respect such Deliverables. After the Commonwealth has completed its testing for such Software and has operated the same for up to sixty (60) consecutive calendar days or as otherwise mutually agreed between the Parties (the "Pre-live Testing Period") in accordance with the Acceptance Criteria, the Commonwealth shall notify Vendor in writing that the Commonwealth has issued its "Pre-live Acceptance" of such Software. If the Commonwealth determines during such period that such Software does not perform in accordance with the Acceptance Criteria, the Commonwealth shall deliver to Vendor a written report describing the deficiencies in reasonable detail. Vendor shall correct any such deficiencies within fifteen (15) calendar days after receiving any such report and shall notify the Commonwealth in writing when such corrections are completed. The Commonwealth may then re-test the Software Component or System Component for an additional Pre-live Testing Period of up to forty-five (45) consecutive calendar days, or as otherwise may be mutually agreed between the Parties, at the end of which the determination, notification, and correction process described above in this Section [5.3.1](#) shall be repeated.

5.3.2. Post-Live Acceptance

Once the Commonwealth has issued its Pre-live Acceptance of all of the Software, the Commonwealth shall begin using such Software in a live, operational environment (the date that such use commences, the "Go Live Date"). Once the Commonwealth has used the Software in such live, operational environment for a the period of time set forth in the Statement of Work, a period that in no event shall last more than thirty (30) consecutive calendar days after the Go Live Date ("Live Testing"), and has reasonably determined the Software performs in all material respects in accordance with the applicable Acceptance Criteria, the Commonwealth shall notify Vendor in writing that the Commonwealth has issued its "Pre-live Acceptance" of such Software. If the Commonwealth determines during such period that such Software Component does not perform in accordance with the Acceptance Criteria, the Commonwealth shall deliver to Vendor, within seven (7) calendar days after the end of the Pre-live Testing Period, or as otherwise may be mutually agreed between the Parties, a written report describing the deficiencies in reasonable detail. Vendor shall correct any such deficiencies within fifteen (15) calendar days after receiving any such report and shall notify the Commonwealth in writing when such corrections are completed. The Commonwealth may then re-test the Software Component for an additional Pre-live Testing Period of up to twenty (20)

consecutive calendar days, or as otherwise may be mutually agreed between the Parties, at the end of which the determination, notification, and correction process described above in this Section shall be repeated.

5.4 Failure to Achieve Acceptance**In the event that: (i) Pre-live Acceptance of Software is not achieved within a reasonable period of time after commencement of Pre-live Testing (such period not to exceed one hundred eighty (180) consecutive calendar days); (ii) Post-live Acceptance of a Deliverable as a whole, is not achieved within a reasonable period of time after the Go Live Date (such period not to exceed one hundred twenty (120) consecutive calendar days), or as otherwise mutually agreed between the parties or (iii) the process described in Section 5.2 with respect to any documentary Deliverable is not completed within one hundred twenty (120) consecutive calendar days after the Commonwealth first commences review and testing of such Deliverable, then the matter shall be deemed a Disagreement as specified herein in Section 25.23. 5.5**

Omitted Test Criteria Unless otherwise specifically provided in the Acceptance Test Procedures, the test for Software shall include testing as set forth in a Statement of Work in each of the following regards: (a) unit testing (i.e., individual testing of each field, screen, screen-related action, and module or program); (b) system testing (i.e., testing of the Deliverable as a whole and its integration with the Commonwealth Software and other Systems of the Commonwealth); (c) volume/stress testing (i.e., testing of the Deliverable under peak conditions to measure response time and system reaction to load); (d) full functional testing (i.e., testing of the Deliverable to ensure all expected functionality is available and accessible); (e) security testing (i.e., testing of the Deliverable to ensure that it meets the security requirements set forth in this Agreement); and (f) ADA testing (i.e., testing of the Deliverable to ensure compliance with all requirements with respect to disabled persons).

6. PERSONNEL

6.1 Vendor Personnel

6.1.1. Vendor's Relationship Manager

Vendor represents that the individual designated as Vendor's Relationship Manager in Schedule 6.1 attached hereto is, and warrants that any replacement holder of such position shall be, an experienced manager who is knowledgeable as to the Commonwealth, its respective businesses, business practices, functions, and related activities, and its respective IT systems, requirements, and needs. The Commonwealth shall have the right to interview, as the Commonwealth deems necessary, and participate in the final selection of, Vendor's Relationship Manager. Without the prior written consent of the Commonwealth, which consent shall not be unreasonably withheld, Vendor shall not: (i) designate a replacement for Vendor's Relationship Manager; or (ii) voluntarily replace or reassign the individual serving as Vendor's Relationship Manager during the first eighteen (18) months after the date that such individual commences performing the duties of Vendor's Relationship Manager hereunder unless such individual (1) voluntarily resigns from Vendor, (2) is dismissed by Vendor for Good Cause, (3) fails to perform his or her duties and responsibilities pursuant to this Agreement, or (4) is unable to work due to disability or death. Vendor's Relationship Manager shall at all times: (a) act as the primary

liaison between Vendor and the Commonwealth's Relationship Manager; (b) have overall responsibility for directing all of Vendor's activities hereunder, directing the performance of all Services from inception through completion; (c) be vested with the necessary authority to fulfill all of the responsibilities of Vendor's Relationship Manager described in this paragraph, including the authority to agree to and execute amendments to this Agreement on behalf of Vendor, unless such authority has been previously and specifically limited by Vendor and Vendor has provided the Commonwealth with a writing evidencing such specific limitation; (d) coordinate the preparation of proposals and other responses to the Commonwealth's requests hereunder, business plans, proposed statements of work, Specifications, Acceptance Criteria, Acceptance Testing Procedures, operating budgets, and financial terms and conditions related to any additional work to be performed by Vendor under this Agreement; and (e) coordinate and conduct periodic program review sessions with the Commonwealth to discuss costs, schedules, and any relevant aspects of Vendor's performance under this Agreement.

6.1.2. Key Personnel

Vendor covenants that the individuals (other than former Commonwealth employees and contractors) and roles designated as Key Personnel in Schedule [6.1](#) attached hereto are, and promises that any subsequent Key Personnel shall be, experienced professionals, possessing the appropriate knowledge, skills, and expertise to perform properly their assigned duties. With regard to each of the Key Personnel, Vendor shall not, without obtaining the Commonwealth's prior written consent at least thirty (30) days in advance, at any time during the first [twelve (12) months] after the date that such individual commences performing Services as one of the Key Personnel hereunder: (i) replace or reassign such individual, if doing so would require the alteration or reduction of such individual's contribution to, or involvement with, the Services, except where such individual voluntarily resigns or is unable to work due to a disability or death; or (ii) terminate the employment of such individual, except with regard to termination for "good cause" (which term, as used in this Agreement, means cause for termination as determined in accordance with Vendor's employment policies, consistently applied). Vendor shall not be required to obtain the Commonwealth's consent to any such replacement or reassignment if the function being performed by the individual being replaced or reassigned is eliminated from the Services. If any of the Key Personnel is reassigned, becomes incapacitated, or ceases to be employed by Vendor, and therefore becomes unable to perform the functions or responsibilities assigned to such person, Vendor shall promptly replace such person with another person at least as well qualified to perform such functions and responsibilities as the person being replaced, and the Commonwealth shall have the right to interview and approve each such replacement. The Parties acknowledge that qualifications include a mix of experience and education and that equally-qualified individuals may have different mixes thereof.

6.1.3. Additional Personnel Requirements

Vendor shall, at all times, make available appropriate and sufficient numbers and types of Vendor Personnel, in addition to Vendor's Relationship Manager and the Key Personnel, to timely perform Vendor's obligations hereunder, in accordance with this Agreement and all Schedules hereto.

6.1.4. Qualified Personnel

Vendor covenants that each Vendor Person (other than Persons formerly employed by the Commonwealth or any Commonwealth contractor) performing Services or providing Deliverables in connection with this Agreement, has qualifications appropriate for the assigned position, duties, and responsibilities and shall perform such duties in accordance with, and meet the requirements set forth in, this Agreement. Vendor further covenants that each Vendor Person (other than Persons formerly employed by the Commonwealth or any Commonwealth contractor) assigned by Vendor or its Subcontractors to perform Vendor's obligations under this Agreement shall possess: (i) experience, skills, training, and expertise appropriate for the assigned duties and responsibilities and at least equal to the commercial standards applicable to personnel performing similar or comparable duties and responsibilities in the business in which Vendor is engaged; and (ii) expertise, knowledge, and orientation with regard to the relevant and applicable aspects of the Services, and of the Commonwealth, and their business practices and information systems, sufficient to enable him or her to properly and timely perform the duties and responsibilities assigned to him or her in connection with this Agreement. . In the event that Vendor breaches any of its obligations with respect to the minimum required proficiency of any Vendor Person, as set forth in this paragraph, Vendor shall promptly, either: (i) take such action with respect to such Vendor Person, including promptly providing appropriate training, education, or orientation, as necessary for such Vendor Person to meet the applicable requirements set forth in this paragraph; or (ii) in the event that the Commonwealth has notified Vendor that such Vendor Person does not meet the applicable requirements set forth in this paragraph, remove and replace such Vendor Person with an appropriately qualified individual, in accordance with this Agreement.

6.1.5. Employee Qualification and Verification

Subject to and in accordance with applicable law, Vendor, prior to assigning an individual as a Vendor Person and at Vendor's sole expense, shall have verified the qualifications of such individual, by verifying employment history, verifying technical training or education completed or degrees awarded, performing drug testing for cause in accordance with Contractor's standard policy, conducting a security background check that includes investigation and identification of all state or federal felony convictions of, such individual's claimed state of residence, during the immediately preceding seven (7) years, and performing such other types of verification as reasonably requested by the Commonwealth or considered reasonably prudent under the applicable circumstances. The security background check described in the preceding sentence shall include an investigation of whether the individual has a recorded conviction of workplace violence, such as threatening others or causing disturbances. At the request of the Commonwealth, Vendor shall promptly deliver a written certification to the Commonwealth that it has performed, , such verification procedures as are set forth in this Section [6.1.5](#) and such individual is eligible to support the Commonwealth. The Commonwealth retains the right to audit the verification methods and processes, , by Vendor in performance of its obligations under this Section [6.1.5](#) in those situations that the Commonwealth deems appropriate. Subject to compliance with applicable legal and regulations, the Commonwealth may reject the assignment of any Vendor Person based upon the results of the verification

procedures set forth in this Section [6.1.5](#), and Vendor shall promptly fill such position with an appropriately qualified person in accordance with this Agreement. Vendor has complied with this Section for its employees or contractors to the extent Vendor has performed these responsibilities with respect to any individual, at any point in his or her employment with Vendor.

6.1.6. Specialized Personnel

If it is necessary, in connection with the performance of the Services, that Vendor Personnel or Subcontractors be assigned responsibilities that requires special health, security, or safety training, then such training will be made available by the Commonwealth at no charge to such individuals and Vendor shall make such individuals reasonably available for such training, with each Party being responsible for its own costs associated with such training (i.e., among other things, Vendor shall not charge the Commonwealth any Fees for any amount of time spent by any of the Vendor Personnel or any Subcontractor attending or receiving such training).

6.1.7. Training

Vendor shall provide, and cause its Subcontractors to provide, all such technical and interpersonal training to the Vendor Personnel, and to any employees of Vendor's Subcontractors that are assigned to provide Services hereunder, as may be necessary and appropriate for them to collectively perform, on behalf of Vendor, all of Vendor's duties under this Agreement. In any event, the levels and extent of training provided by Vendor to the Vendor Personnel shall be at least equal to the average levels of training given to other Vendor employees holding comparable positions, under similar circumstances, and performing work of a similar nature and level of complexity.

6.1.8. Replacement of Personnel

Notwithstanding anything to the contrary contained elsewhere in this Agreement, if the Commonwealth believes that the performance or conduct of any Vendor Person or Subcontractor is unsatisfactory for any reason, or is not in compliance with the provisions of this Agreement, the Commonwealth may so notify Vendor and Vendor shall promptly and appropriately address the performance or conduct of such person, or, at the Commonwealth's reasonable request, immediately remove and replace such person with another person acceptable to the Commonwealth and meeting all of the applicable requirements described in this Section [6.1](#).

6.1.9 Commonwealth Personnel

Vendor may request at any time the removal of (and the Commonwealth will remove) any Commonwealth employee or Commonwealth controlled or directed contractor employee performing services in connection with this Agreement Vendor: (1) reasonably believes that individual is not qualified to perform the services or tasks required of that individual for the project or does not meet appropriate professional standards; and (2) previously

provided the Commonwealth with prior written notice of the problem and a reasonable opportunity to remedy the situation.

6.2 The Commonwealth's Relationship Manager

The Commonwealth's Relationship Manager shall: (i) act as the primary liaison between the Commonwealth and Vendor's Relationship Manager; and (ii) have overall responsibility for directing and coordinating all of the Commonwealth's activities hereunder, and shall be vested with all necessary authority to fulfill that responsibility. The Commonwealth's initial Relationship Manager is identified in Schedule [6.1](#) attached hereto.

6.3 Conflict of Interest

The Commonwealth's policies expressly prohibit it and its employees from engaging in activities involving a conflict of interest. Except as provided in this Agreement, Vendor shall not at any time during the Term of this Agreement employ or otherwise engage any Commonwealth employee for any purpose in any way related to Vendor's performance of its obligations hereunder. Vendor shall at all times exercise reasonable care and diligence to Such efforts by Vendor shall include establishing reasonable precautions to prevent its employees, agents, and Subcontractors from making, receiving, providing, or offering to any employees of the Commonwealth any gifts, entertainment that could appear to or be deemed to, or create the impression of an attempt to, influence individuals to act in a manner contrary to the best interests of the Commonwealth.

6.4 Non-Solicitation of Employees

Except as otherwise expressly provided in this Agreement, during the Term and for the first twelve (12) months thereafter, neither Party shall, without the prior written consent of the other Party, directly or indirectly solicit, entice, encourage, or otherwise recruit any employee of such other Party whose duties and responsibilities include performing services directly or indirectly connected with performance under this Agreement to leave such other Party's employ in order to accept employment or other engagement with the soliciting Party, its Affiliates, actual or prospective contractors, or any other Person. Notwithstanding the foregoing, the Parties acknowledge and agree that this Agreement shall not prohibit solicitations by either Party through general advertising or other publications of general circulation. In no way is this Section [6.4](#) intended, nor shall it be deemed, to restrict or limit any individual's right to seek employment, but rather this Section [6.4](#) is intended to, and shall, prevent each Party from actively recruiting and hiring the employees of the other Party, thereby depriving such other Party of vital resources, in the securing, development, training, and deployment of whom it has expended considerable time and resources.

7. AUTHORITY RETAINED BY COMMONWEALTH

The Commonwealth shall have and at all times retain the right and authority to: (i) define, determine, and control the Commonwealth's IT- and business process- related policies, strategies, objectives, and goals; (ii) define, determine, and alter any or all of the

Commonwealth's business processes; (iii) define and prescribe design standards and architecture with regard to the IT platform and infrastructure for the Commonwealth; and (iv) assess the Commonwealth's view of Vendor's quality and performance. Vendor shall, at all times during the Term and during Disentanglement, perform and provide the Services in accordance with the strategies, processes, standards, and policies described in the immediately preceding sentence. The Commonwealth may consider, but shall have the right to approve or reject, in its discretion, any and all Vendor-proposed decisions with respect to changes to the Services or the Systems that could reasonably be expected to materially increase the Fees payable by the Commonwealth for the Services or to materially increase the costs incurred by the Commonwealth at any time in operating its business. Moreover, Vendor shall be required to obtain the prior, written authorization of the Commonwealth before: (i) undertaking any activity that is within the exclusive authority of the Commonwealth to order, request, or designate pursuant to the terms hereof; (ii) using in the performance of the Services, or otherwise incorporating or introducing into the Commonwealth's IT environment, any proprietary software or other technology that materially increases, or might reasonably be expected to increase, the cost to the Commonwealth in using, operating, supporting, or maintaining the Systems in comparison to the cost that the Commonwealth would otherwise incur in such activities (including any incremental costs associated with procuring applicable licenses to any Vendor-proprietary software or technology that is transferred to the Commonwealth during or as a result of a Disentanglement in comparison to the costs that the Commonwealth would have incurred by obtaining other functionally comparable or equivalent, commercially available software or technology). The Commonwealth's rights to require changes to the Services or Systems, or to direct the manner of performance of the Services, as set forth in this Section shall be subject to the Change Management Procedure.

8. FINANCIAL TERMS

Except as otherwise provided in this Agreement, as full remuneration, and the sole and entire financial consideration, for Vendor's performance of all of the Services, provision of all of the Deliverables, and performance of all of the other tasks, activities, services, duties, and obligations of Vendor under this Agreement, the Commonwealth shall compensate Vendor in accordance with this Section [8](#).

8.1 Compensation for Services

The Commonwealth shall compensate Vendor for the Services actually performed by Vendor in accordance with the terms and conditions of this Agreement (including the applicable Statement of Work). Except as otherwise expressly provided in Section [12.1](#) or elsewhere in this Agreement, Vendor shall not be entitled under this Agreement to any additional or separate compensation or reimbursement, other than in accordance with the compensation structure expressly set forth in the Statements of Work, for the performance of Services, for any costs or expenses incurred in connection with performance hereunder, for any transition fees or exit fees, or for any other type or form of fees or reimbursement. Any or all elements of a Statement of Work may be priced on a fixed fee basis, time and materials basis, or any other pricing methodology agreed upon by the Parties therein. With respect to any elements of a Statement of Work for which the Services thereunder shall be performed on a time and materials

basis, the Fees for such elements of a Statement of Work shall be calculated using the time and materials rates (the "T&M Rates") for Vendor Personnel set forth in Schedule [8.1](#) (the "Fee Schedule"). The T&M Rates shall apply throughout the Term; provided that, commencing after the one year anniversary of the Effective Date, and no more often than once per year thereafter, Vendor may, by written notice to the Commonwealth, increase the amount of any of the T&M Rates by no more than the CPI Increase over the amount of such rate the prior year. Unless otherwise agreed, changes in the Services and changes in the rights or obligations of the Parties under this Agreement shall result in changes in the applicable compensation structure only if and to the extent the applicable Statement of Work expressly provides for a change in the compensation structure in such circumstances.

8.3 Invoices

8.3.1. Vendor Invoices

Vendor shall invoice the Commonwealth in arrears for the Fees in accordance with the provisions of this Agreement and the applicable Statement of Work, but in no event more frequently than once per month. Credits and adjustments (i.e., Performance Credits) for any given month will be applied against the next monthly invoice after the invoice for such month. For example, Vendor's December 2006, invoice will include Fees for Services performed during November 2006, and any credits or adjustments applicable to Services performed in October 2006. Each such invoice shall be in the format shown in Exhibit [8.3](#) hereto (or such other reasonable format as specified from time to time by the Commonwealth) and, with respect to the Fees, credits, adjustments or the timeframe to which such invoice is applicable, shall set forth in reasonable detail: (a) an itemized accounting of the Fees and any applicable credits and adjustments; (b) the Services performed (e.g., each particular activity or task) to the extent provided on the Effective Date; (c) the identity of the Vendor Personnel performing such Services to the extent the charging methodology is per Person; (d) with respect to any Services billed on an hourly or time-and-materials basis, the number of hours and corresponding Fees attributable to each such Vendor Person's performance of such Services; and (e) any other information or data necessary to support such Fees, credits, and adjustment. Any improperly formatted invoices may be returned by the Commonwealth for correction and resubmission. The Parties shall agree on the format of the invoices prior to the Service Commencement Date.

8.3.2. Payment by Commonwealth

The Commonwealth shall pay Vendor all amounts set forth in invoices properly issued in accordance with this Section [8](#), within thirty (30) days after the Commonwealth's receipt thereof. (the "Payable Date"), subject to Section 8. The Commonwealth may however, withhold payment of any invoiced amounts that the Commonwealth disputes in good faith in accordance with Section [8.5](#), pending resolution of the matter. All payments by the Commonwealth shall be made by wire transfer, unless the Parties mutually agree in writing to an alternative form or method of payment. If any payments or portions thereof are not received by Vendor within five days after the Payable Date, the

Commonwealth will pay IBM Interest for each day between and including the 6th day after the Payable Date and the date IBM receives such late payment in full.

8.3.3. Payment of Subcontractor Invoices

Vendor shall be responsible for payments to its Subcontractor(s) performing Services under this Agreement.

8.4 Set-Off

The Commonwealth may set off against any and all amounts otherwise payable to Vendor pursuant to any of the provisions of this Agreement: (i) any and all amounts claimed by the Commonwealth in good faith to be owed by Vendor to the Commonwealth pursuant to any of the provisions of this Agreement, subject to Section [8.5](#) with respect to any disputed amounts. Within twenty (20) days after any such set-off by the Commonwealth, the Commonwealth shall provide Vendor with a written accounting of such set-off and a written statement of the reasons therefor.

8.5 Disputed Amounts

The Commonwealth may withhold payment of the disputed portion of any Fees or any other charges otherwise due to Vendor under this Agreement to the extent that the Commonwealth disputes such charges in good faith., up to an amount equal to 20% of any monthly invoice, but in no event more than one-twelfth (1/12) of the then-current Annual Fees hereunder, in the aggregate (the "Disputed Fees Cap"). All amounts in excess of the Disputed Fees Cap shall be paid promptly to Vendor, under protest without waiver of rights. In such case, the Commonwealth shall provide to Vendor a reasonably detailed written explanation of the basis for the dispute and shall continue to make payments of undisputed amounts as otherwise provided in this Agreement. If any disputed amounts are later determined to have been improperly withheld (i.e., properly charged by Vendor), then the Commonwealth shall be obligated to pay the withheld amount plus Interest thereon from the original due date applicable to such amounts, in accordance with this Agreement, until paid in full. If any paid amounts are later disputed by the Commonwealth and determined to have been improperly paid (i.e., improperly charged by Vendor), then Vendor shall promptly pay the Commonwealth, in cash, the improperly paid amount, plus Interest thereon from the original date paid. The failure of the Commonwealth to withhold payment shall not waive any other rights the Commonwealth may have with respect to disputed amounts or overpayments. Except as otherwise provided herein, any dispute relating to amounts owed by a Party hereunder shall be considered a Disagreement.

8.6 Taxes

Sales to the Commonwealth are normally exempt from state sales tax. State sales and use tax certificates of exemption, form ST-12, are available online at <http://www.tax.virginia.gov>. Deliveries against this Agreement shall usually be free from federal excise and transportation taxes. The Commonwealth excise tax exemption registration number is 54-73-0076K. Subject this Section, the Fees shall be inclusive of all taxes imposed with respect

to the provision of the Services hereunder, including any sales, use, excise, value-added, services, consumption, or other tax; provided, however, that the Commonwealth shall not be responsible for, and the Fees shall not include, any taxes imposed on or arising from the following: (i) charges for goods and services provided by the Commonwealth to Vendor in connection with this Agreement; (ii) Vendor's consumption of goods and services in connection with this Agreement; (iii) Vendor's income, revenue or property; (iv) any franchise or privilege taxes; or (v) employment-related taxes applicable to Vendor's employees and Subcontractors. The Parties agree to cooperate with each other to more accurately determine its own tax liability and to minimize such liability to the extent legally permissible. In the event the Commonwealth or any of their end users are not exempt from any sales and use taxes, the Commonwealth shall be responsible for such taxes in addition to the Fees.

8.7 Time Limitation

The Commonwealth shall have no obligation to pay any amount for which Vendor fails to provide the Commonwealth with an invoice within ninety (90) days after the month in which the relevant Services should have been invoiced, except where the invoice is based on the Commonwealth's records (e.g. the number of End Users) and except as otherwise permitted by applicable law or regulation. . Vendor waives any right it may have to invoice or collect such amounts.

8.8 Availability of Funds

Each payment obligation of the Commonwealth is contingent upon the appropriation of sufficient government funds for the payment of such an obligation. The Commonwealth shall use all commercially reasonable efforts to secure appropriations or allocations of sufficient funds to pay the Fees under this Agreement . If funds are not appropriated to the Commonwealth for the continuance of the function performed by any of the Deliverables or Services of Vendor, or any portion thereof, then such Deliverables and Services, to the extent directly or indirectly involved in the performance of such function, may be terminated by the Commonwealth pursuant to Section [11.6](#). The Commonwealth shall notify Vendor of any such Deliverables or Services that will or may be affected by such a shortage of funds as soon as commercially reasonable after first learning thereof. No penalty shall accrue to the Commonwealth in the event of such non-appropriation, and in no event shall the Commonwealth be obligated or liable for any future payments of any kind with respect to such terminated Deliverables or Services.

8.9 Payment upon Termination

Vendor shall submit a final completion cost or credit invoice upon (but in no event later than one hundred eighty (180) days after any termination of the Term by the Commonwealth for convenience, pursuant to Section [11.2](#), for change in control of Vendor, pursuant to Section [11.3](#), or for a lack of funds, pursuant to Section [11.6](#) hereof. The Commonwealth shall promptly make payment of any remaining amounts due and payable to Vendor for Services rendered.

8.10 Customer Service Number

Vendor shall provide for use by the Commonwealth, and conspicuously print on each of Vendor's monthly invoices to the Commonwealth, a toll-free telephone number for billing-related questions, inquiries, or requests for adjustments. The Vendor Personnel assigned to answer and respond to such questions, inquiries, or requests shall be fully familiar and conversant with the Services, the Fees structure, and the terms and conditions of this Agreement.

8.11 Performance Credits

Each Statement of Work that contains Service Levels also sets forth specified Performance Credits that shall be granted to the Commonwealth if and when Vendor's actual performance of Services thereunder fails to meet certain levels, as measured against such Service Levels. It is understood that Performance Credits are intended to reflect, to some extent, the diminished value of Vendor's Services in the applicable events, but are not intended to constitute penalties or liquidated damages. In no event shall Performance Credits be the Commonwealth's sole and exclusive remedy with respect to any failure of Vendor to comply with applicable Service Levels or performance requirements.

9. PROPRIETARY RIGHTS

9.1 Commonwealth Works

9.1.1. Ownership by the Commonwealth

All Commonwealth Works, and all modifications or derivatives of such Commonwealth Works, including all Intellectual Property Rights in or pertaining to the same, shall be owned solely and exclusively by the Commonwealth.

9.1.2. License Grant to Vendor

As of the Effective Date, the Commonwealth hereby grants, and Vendor hereby accepts, a limited, non-exclusive, non-transferable, royalty-free right and license to use the Commonwealth Works during the Term and during Disentanglement to the extent necessary and appropriate for the sole purpose of Vendor's performing the Services and providing the Deliverables, subject to, and as provided for by, the terms and conditions of this Agreement. Vendor acknowledges that the Commonwealth Works represent the valuable, intellectual property of the Commonwealth (or licensors). To the extent necessary for Vendor to provide the Services, such license grant extends to Subcontractors designated by Vendor that sign a written agreement to be bound by all of the terms contained herein applicable to the Commonwealth Works. Vendor and its Subcontractors shall not (i) use any of the Commonwealth Works for the benefit of any Person other than the Commonwealth, or (ii) reverse assemble, reverse engineer, translate, disassemble, decompile any of the Commonwealth Works without the prior written approval of the Commonwealth, which may be withheld in the Commonwealth's sole discretion.

9.2 Vendor Works

9.2.1. Ownership by Vendor

All Vendor Works, and all modifications or derivatives of such Vendor Works, including all Intellectual Property Rights in or pertaining to the same, shall be owned solely and exclusively by Vendor.

9.2.2. License Grant to the Commonwealth

As of the Effective Date, Vendor hereby grants, and the Commonwealth hereby accepts, for the benefit of the Commonwealth a limited, non-exclusive, worldwide, fully paid, royalty-free license to, use, , the Vendor Software to the extent necessary for the Commonwealth to receive Services during the Term and any period of Disentanglement. The Commonwealth shall not reverse assemble, reverse engineer, translate, disassemble, decompile any of the Vendor Software without the prior written approval of Vendor, which may be withheld in Vendor's sole discretion.

9.3 New Works

9.3.1. Work Product

All Work Product, including all Intellectual Property Rights in or pertaining to the same but excluding any Commonwealth Confidential Information, shall be owned solely and exclusively by the Vendor. r Vendor hereby grants to the Commonwealth a worldwide, fully paid, perpetual, nonexclusive license to use the Work Product internally in connection with providing services similar to the Services to the Commonwealth or having a third party provide services similar to the Services to the Commonwealth, provided that any such third party executes a confidentiality agreement reasonably acceptable to Vendor .

9.3.2. Developed Customer Software

The following Software developed pursuant to this Agreement by Vendor or its Subcontractors (alone or jointly with others) shall be considered "Developed Customer Software": (A) modifications to, or upgrades or enhancements (derivative works) of, Commonwealth Software; (B) newly developed software that does not modify or enhance then-existing Software that Vendor develops for Commonwealth as a separately chargeable Deliverable hereunder; and (C) modifications to, or upgrades or enhancements (derivative works) of, Third Party Software provided by the Commonwealth under this Agreement. As between the Parties, the Commonwealth shall have all rights, title and interest in and to the copyrights in Developed Customer Software and all copies made from it.

Subject to the confidentiality terms herein with respect to any Commonwealth Confidential Information, the Commonwealth hereby grants Vendor an irrevocable, fully paid-up, non-exclusive, worldwide license to use, modify, distribute and create and distribute derivative works of Developed Customer Software (other than with respect to the

Developed Customer Software described in Section [9.3.3](#)(C) which Customer is not entitled to license to Vendor under Customer's license with the third party and which Vendor is not entitled to a license under its own license agreements with the third party) which includes the right to sublicense and otherwise permit third parties to do any of the foregoing.

9.3.3. Developed Vendor Software

The following Software developed pursuant to this Agreement by Vendor or its Subcontractors (alone or jointly with others) shall be considered "Developed Vendor Software": (A) modifications to, or upgrades or enhancements (derivative works) of, Vendor Software; (B) newly developed software that does not modify or enhance then-existing Software for which Vendor does not provide to the Commonwealth as a separately chargeable Deliverable hereunder; and (C) modifications to, or enhancements (derivative works) of, Third Party Software provided by Vendor under this Agreement. As between the Parties, Vendor shall have all rights, title and interest in and to Developed Vendor Software and all copies made from it.

IBM hereby grants to the Commonwealth a perpetual, worldwide, fully paid-up, non-exclusive, worldwide copyright license (A) to use all Developed Vendor Software (other than with respect to the Software described in Section [9.3.3](#) (C) which Vendor is not entitled to license to the Commonwealth under Vendor's license with the third party and which the Commonwealth is not entitled to use under its own license agreements with the third party) solely to provide services similar to the Services for itself during the Term and any Disentanglement, and (B) to permit third parties to use all Developed Vendor Software (other than with respect to the Software described in Section [9.3.3](#) (C) that Vendor is not entitled under its license agreement with the Third Party Software vendor to license to third parties unless such third parties are entitled to use under their own license agreements with the third party) that is developed specifically for use in the the Commonwealth's IT environment, or that is otherwise necessary for the Commonwealth to maintain Service continuity after transitioning responsibility for the Services to a third party, solely to provide services similar to the Services for the Commonwealth during the Term and any Disentanglement

9.4 Third Party Works

9.4.1 License Grant to Vendor

Subject to Vendor having obtained any necessary required consents, and solely to the extent of the Commonwealth's underlying rights, the Commonwealth hereby grants, and Vendor hereby accepts, a limited, non-exclusive, non-transferable, royalty-free right and license to use the Third Party Works and Pass-Through Software during the Term, to the extent necessary and appropriate for the sole purpose of Vendor's performing the Services and providing the Deliverables, and operating and supporting and maintaining the Systems, subject to, and as provided for by, the terms and conditions of this Agreement. To the extent necessary for Vendor to provide the Services, such license grant extends to Subcontractors designated by Vendor that sign a written agreement to be bound by all of the terms contained herein applicable

to the Third Party Works. Vendor and its Subcontractors shall not (i) use any of the Third Party Works for the benefit of any Person other than the Commonwealth, or (ii) reverse assemble, reverse engineer, translate, disassemble, decompile any of the Third Party Works without the prior written approval of the Commonwealth, which may be withheld in the Commonwealth's sole discretion. Notwithstanding anything to the contrary contained in this Agreement, the Commonwealth's rights in and to any Pass-Through Software and any modifications thereto shall be solely and exclusively governed by the terms of the relevant separate license agreement between the third party Pass-Through Software owner or supplier and the Commonwealth. Vendor is not a party to any Pass-Through license agreements and will not assume any liabilities or obligations thereunder.

9.4.2. License Grant to the Commonwealth

Unless otherwise provided in this Agreement or expressly and mutually agreed to by the Parties in writing, Vendor shall not implement or utilize any Third-Party Works in the provision of any Services unless Vendor shall have secured for the Commonwealth a perpetual, non-exclusive, royalty-free, fully paid-up, worldwide license to use or receive the benefit of such Third-Party Works as necessary and appropriate for the proper conduct of the Commonwealth's business. Further, Vendor shall not embed any Third-Party Works in any Work Product, or create a derivative work of any Third-Party Work as Work Product, without the express, prior written consent of the Commonwealth. At the Commonwealth's direction, in the event of a request for such consent by Vendor, Vendor will attempt to negotiate such rights and other concessions regarding such works or modifications for the benefit of the Commonwealth, as the Commonwealth may request. In the event that Vendor is required by this Agreement, or requested or directed by the Commonwealth in accordance with this Agreement, to implement, set up, configure, or otherwise prepare any Third-Party Works for use by the Commonwealth or for use by Vendor in performing the Services:

(a) Subject to the rights of the applicable Third Party, the Commonwealth shall be the sole and exclusive owner of all Intellectual Property Rights in and to any Work Product that is the output of, or otherwise results from, such implementation, set up, configuration, and other preparation efforts;

(b) Vendor shall deliver to the Commonwealth comprehensive Documentation of such output or results, promptly upon completion thereof;

(c) In any event, unless otherwise provided herein, Vendor shall use all commercially reasonable efforts to cause the third-party licensors of any such Third-Party Works to grant to the Commonwealth a right to use, and to sublicense third-party service-providers to use, any such Third-Party Works solely and exclusively for the Commonwealth's internal business purposes or, in the case of such third-party service-providers, for providing services to the Commonwealth. The Commonwealth shall be responsible for ensuring that such third party service-providers comply with such sublicenses, including restrictions on use and the confidentiality provisions contained in this Agreement.

9.5 Residuals

Notwithstanding anything to the contrary provided in this Agreement, neither Party shall be precluded from using Residuals

9.7 Commonwealth Data

To the extent permitted by applicable law, the Commonwealth shall permit Vendor and its Subcontractors to have access to, and make appropriate use of, Commonwealth Data solely to the extent Vendor requires such access and use in order to properly and appropriately perform the Services as contemplated by this Agreement. Vendor may only access and use Commonwealth Data in connection with performance of its duties under this Agreement or as specifically directed by the Commonwealth in writing and may not otherwise use, disclose, modify, merge with other data, commercially exploit, or make any other use of Commonwealth Data, except as expressly permitted herein or as expressly directed by the Commonwealth in writing. Vendor acknowledges and agrees that, as between the Parties, the Commonwealth owns all right, title, and interest in, and all Intellectual Property Rights in and to, all Commonwealth Data. Vendor agrees that all copyrightable aspects of Commonwealth Data shall be considered “work made for hire” within the meaning of the Copyright Act of 1976, as amended, subject to Section [9.5](#) Vendor hereby assigns to the Commonwealth exclusively, without further consideration, all right, title, and interest in and to Commonwealth Data, and all Intellectual Property Rights therein or pertaining thereto, that it may have or obtain, free from any claim, lien for balance due, or rights of retention thereto on the part of Vendor. Vendor also acknowledges that the Parties do not intend Vendor to be, nor in any event shall Vendor be deemed, a joint author of Commonwealth Data within the meaning of the Copyright Act of 1976, as amended. Except as expressly provided herein, Vendor shall in no event, nor in any form or manner, commercially exploit, or make any unauthorized use or disclosure of, any Commonwealth Data. Vendor shall at all times maintain safeguards and security measures specified in this Agreement that are designed to ensure the confidentiality and security of Commonwealth Data in accordance with the terms of this Agreement. . In no event shall Vendor withhold Commonwealth Data from, or deny access thereto by, the Commonwealth in connection with any Disagreement.

9.9 Cooperation

If at any time either Party brings, , any claim against any third party for infringement of any Intellectual Property Right of such Party, directly related to this Agreement including misappropriation of trade secrets and improper use or disclosure of Confidential Information, then the other Party, upon the request and at the expense of the requesting Party, shall cooperate with and assist such requesting Party in the investigation or pursuit of such claim and provide such requesting Party with any non-privileged information in its possession directly related to such claim subject to any confidentiality requirements. Notwithstanding the foregoing, if an Affiliate, client, subcontractor, agent, employee, customer, or other business associate of a

Party becomes the subject of such an investigation by the requesting Party, such Party will provide reasonable cooperation to the requesting Party, to the extent not inconsistent with such Party's legal or contractual obligations to such Affiliate, client, subcontractor, agent, employee, customer, business associate, or third party..

10. COMPLIANCE WITH COMMONWEALTH POLICIES AND PROCEDURES

10.1 Policies and Procedures

Vendor covenants that it, its Subcontractors, the Vendor Personnel, and all other agents and representatives of Vendor, shall at all times comply with and abide by all policies and procedures of the Commonwealth (or subject to the Change Management Procedure, that may be established thereby, from time to time) that reasonably pertain to Vendor (and of which Vendor has been provided with advance notice) in connection with Vendor's performance of the Services and the provision of the Deliverables, to the extent set forth in Schedule [10](#) attached hereto. Vendor shall cooperate with the Commonwealth in ensuring Vendor's compliance with the policies and procedures described in this Section [10](#), and any violations or disregard of such policies or procedures shall, in addition to all other available rights and remedies of the Commonwealth, be cause for denial of access or use by Vendor Personnel to the Commonwealth's information systems, networks, equipment, property, and facilities. Without limiting the foregoing, Vendor agrees to the following:

10.1.1. Security and Policies

At all times during the Term, Vendor shall provide all Services in accordance with the Commonwealth's security requirements, policies, and procedures as set forth in Schedule [10](#) attached hereto and as modified, supplemented, or replaced by the Commonwealth from time to time subject to the Change Management Procedure, (collectively, the "Security Policies"). Vendor shall In addition, all Vendor Personnel (including personnel of any Subcontractors) shall be subject to, and shall at all times conform to, all of the Commonwealth's policies, procedures, rules, and requirements regarding the protection of premises, materials, equipment, and personnel, also as set forth in Schedule [10](#) attached hereto (and contained within the Security Policies). Vendor shall, and shall cause the Vendor Personnel and Subcontractors to, fully comply with and abide by all such Security Policies at all times during the Term. Any violation or disregard of such Security Policies by an individual Vendor Person or Subcontractor shall be cause for denial of access of such Person to the Commonwealth's Systems or property. Vendor shall exercise due care and diligence designed to prevent any injury to person or damage to tangible property while on the Commonwealth's premises.

10.1.2. Information Access

Prior to performing any Services, Vendor personnel who will access the Systems, or the Commonwealth's computer data and Software, including Commonwealth Data and Commonwealth Software, shall execute a confidentiality and non-disclosure agreement with their respective employers.. At all times during the Term, Vendor shall, and shall cause the

Vendor Personnel and Subcontractors, and the employees or agents of any of the foregoing, to, fully comply with all of the Commonwealth's policies and procedures regarding data access and security, including those prohibiting or restricting remote access to the Systems and Commonwealth Data, as set forth in the Security Policies. Vendor shall, and shall cause the Vendor Personnel and Subcontractors to, fully comply with and abide by all such Security Policies at all times during the Term. The Commonwealth shall authorize, and Vendor shall issue, any necessary information-access mechanisms, including access IDs and passwords, and in no event shall Vendor permit any such mechanisms to be shared or used by other than the individual Vendor Person to whom issued. Vendor shall provide each Vendor Person with only such level of access as is required for such individual to perform his or her assigned tasks and functions. From time to time throughout the Term, upon request from the Commonwealth but at least once each Contract Quarter, Vendor shall provide the Commonwealth with an accurate, up-to-date list of those Vendor Personnel having access to the Commonwealth's Systems, Software, or data, and the respective security level or clearance assigned to each such Vendor Person. All Systems, and all data and software contained therein, including Commonwealth Data and Commonwealth Software, used or accessed by Vendor Personnel: (i) shall be used and accessed by such Vendor Personnel solely and exclusively in the performance of their assigned duties in connection with, and in furtherance of, the performance Vendor's obligations hereunder; and (ii) shall not be used or accessed except as expressly permitted hereunder, or commercially exploited in any manner whatsoever, by Vendor, the Vendor Personnel or any Subcontractor, at any time. Vendor acknowledges and agrees that any failure to comply with the provisions of this Section [10.1.2](#) shall entitle the Commonwealth to deny or restrict the rights of such non-complying Vendor Personnel to access and use the Systems, Commonwealth Data, and Commonwealth Software, as the Commonwealth in its sole discretion shall deem appropriate. Vendor shall at all times use appropriate safeguard and security measures specified in this Agreement that are designed to ensure that the confidentiality and security of all Commonwealth Data are securely maintained.

10.1.3. Enhanced Security Procedures

The Commonwealth may, in its discretion, designate certain areas, facilities, or Systems as ones that require a higher level of security and access control. The Commonwealth shall notify Vendor in writing reasonably in advance of any such designation becoming effective. Any such notice shall set forth in reasonable detail the enhanced security or access-control procedures, measures, or requirements that Vendor shall be required to implement and enforce, as well as the date on which such procedures and measures shall take effect. Vendor shall, and shall cause the Vendor Personnel and Subcontractors to, fully comply with and abide by all such enhanced security and access measures and procedures as of such date. All obligations in this Section 10.1.3 shall be subject to the Change Management Procedure.

10.1.4. General Security Standards

At all times during the Term, Vendor shall maintain a level of security with regard to the Systems, Commonwealth Data and the Commonwealth Software (the foregoing that are in Vendor's possession that in no event is any less secure than any of the following levels of security: (i) that maintained by the Commonwealth with regard to such

Systems, Commonwealth Data and the Commonwealth Software; (ii) or (iii) that common and prevalent in the IT industry and in accordance with industry practices.

10.1.5. Breach of Security

10.1.6. Conduct on Commonwealth Premises

Vendor shall at all times comply with and abide by all policies and procedures of the Commonwealth provided to Vendor in writing (or that may be established thereby, from time to time subject to the Change Management Procedure) that pertain to conduct on Commonwealth premises, possession or distribution of contraband, or the access to, and security of, Commonwealth real property or facilities. Vendor shall exercise due care and diligence designed to prevent any injury to persons or damage to tangible property while on the Commonwealth's premises. The operation of vehicles by any of the Vendor Personnel on the Commonwealth's property shall conform to posted and other applicable regulations and safe-driving practices. Vehicular accidents occurring on the Commonwealth's property and involving any of the Vendor Personnel shall be reported promptly to the appropriate Commonwealth personnel. Vendor covenants that at all times during the Term, it, and its employees and agents (including all Vendor Personnel) and Subcontractors shall comply with, , any applicable federal, state, and local laws, ordinances, regulations, and rules applicable to them as services providers.. Vendor Personnel shall clearly identify themselves as Vendor Personnel and not as employees of the Commonwealth. When on Commonwealth premises, Vendor Personnel shall wear and clearly display identification badges or tags, as approved by the Commonwealth.

11. TERM AND TERMINATION

11.1 Term

11.1.1. Initial Term

The period during which Vendor shall be obligated to provide the Services under this Agreement (the "Term") shall commence on the Effective Date and end on the date (the "Expiration Date") that is: (i) the seven (7) year anniversary of the Effective Date (or, in the event of any renewal of the Term, pursuant to Section [11.1.2](#), the last day of the last of such renewals or extensions); or (b) the applicable Termination Date, in the event of a termination pursuant to Sections [11.2](#), [11.3](#), [11.4](#), [11.5](#), [11.6](#), or [11.7](#). In the event that the term of a Statement of Work extends beyond the Expiration Date of this Agreement, and the Statement of Work in question has not also been expressly terminated by the Parties, all applicable terms and conditions of this Agreement shall survive until the completion of Services under the applicable Statement of Work.

11.1.2. Term Renewals

The Commonwealth may, in its sole discretion, renew the Term for up to [two (2)] successive periods of not more than [three (3)] years each (as designated by the Commonwealth, in its sole discretion), in accordance with the pricing terms and conditions set forth herein, by providing written notice delivered to Vendor at least ninety (90) days before the end of then-current Term (as such Term may have been renewed or extended, in accordance herewith).

11.1.3. Notifications

Unless the Commonwealth shall have already notified Vendor in writing that the Commonwealth is renewing the Term, pursuant to Section [11.1.2](#), for an additional period, or the Parties shall have already reached written mutual agreement on the terms and conditions to otherwise govern a renewal of the Term, Vendor shall notify the Commonwealth in writing within five (5) days before or after the date that is one hundred eighty (180) days prior to the date on which then-current Term shall expire of the approaching expiration of the Term. In the event that the Parties fail to renew the Term and the Commonwealth fails to extend the Term, or in the event of the approaching expiration of the subsequent successive Term extension period(s), each as described above, Vendor shall notify the Commonwealth in writing of the approaching expiration of the Term at least seventy-five (75), and not more than ninety (90), days before the date of such expiration.

11.2 Termination by the Commonwealth for Convenience

In accordance with this Section [11.2](#), the Commonwealth shall have the right to terminate for its convenience, at any time and for any reason or no reason: (i) the Term of this Agreement with regard to the Services, or (ii) any portion the Services (e.g., a Statement of Work or subcomponent), then being provided by Vendor. Any such termination shall be effected by the Commonwealth sending to Vendor a written notice of termination specifying the extent of the Services being terminated and the intended date (the "Termination Date") upon which, at 11:59 p.m., such termination shall be effective (any such notice, a "Termination Notice"). The Termination Date specified in any such Termination Notice sent by the Commonwealth pursuant to this Section [11.2](#) shall be at least ninety (90) days after the date of such Termination Notice. In the event that the Commonwealth terminates or ends the Term of this Agreement or any portion of the Services pursuant to this Section [11.2](#), the Commonwealth shall pay Vendor the applicable Exit Fee.

11.3 Termination by the Commonwealth for Change in Control

In the event of a change in control of Vendor (as described below) resulting from a single transaction or a series of related transactions, the Commonwealth shall have the right to terminate: (i) the Term of this Agreement with regard to the Services, or (ii) any portion the Services (e.g., a Statement of Work or subcomponent), then being provided by Vendor by sending to Vendor a Termination Notice at least (1) 180 days after the effective date of such change of control, and (2) thirty (30) days before the Termination Date specified therein. Solely

for purposes of this Section [11.3](#): (i) “control” means possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of Vendor, whether through the ownership of voting securities, by contract or otherwise; and (ii) a “change in control” shall be deemed to have occurred whenever, as a result of a single transaction or a series of related transactions, a Person (or a group of Persons acting in concert) that had not previously had control of obtains control of Vendor or the applicable Key Subcontractor, in accordance with clause (i) of this Section [11.3](#). In the event the Commonwealth terminates the Term or any portion of the Services pursuant to this Section [11.3](#), the applicable Exit Fees shall be payable by the Commonwealth to Vendor.

11.4 Termination for Default

11.4.1. By the Commonwealth

Notwithstanding anything to the contrary in Section [21](#), the Commonwealth shall have the right to terminate: (i) the Term of this Agreement with regard to the Services, or (ii) any portion the Services (e.g., a Statement of Work or subcomponent), then being provided by Vendor by delivery of a Termination Notice to Vendor, if: (a) Vendor commits a Default under this Agreement; or (b) Vendor has incurred liability under the Agreement in an aggregate amount equal to or greater than ninety percent (90%) of then applicable limit on liability specified in Section [13.1.1](#). In the event of any such termination by the Commonwealth for Default, Vendor shall nevertheless perform its Disentanglement obligations under Section [12](#) of this Agreement until they are fulfilled Any such termination shall not constitute the Commonwealth’s exclusive remedy for such Default, nor shall such a termination cause the Commonwealth be deemed to have waived any of its rights accruing hereunder prior to such Default. If the Commonwealth terminates the Term or any portion of the Services as a result of a claimed Default by Vendor pursuant to the terms of this Section [11.4](#), and Vendor does not agree that a Default was committed, then Vendor shall have the right to avail itself of all remedies available to it at law or in equity. ..

11.4.2. By Vendor

Vendor may terminate this Agreement upon written notice solely if (i) the Commonwealth has failed to make undisputed payments due or disputed payments in excess of the Disputed Fees Cap under this Agreement and fails to make such payments within ten (10) days of written notice from Vendor. .

11.5 Termination by the Commonwealth for Force Majeure Event

In the event that Vendor experiences a Force Majeure Event that causes a delay or interruption in its performance of a significant or substantial portion of the Services that exceeds fifteen (15) consecutive calendar days in duration, the Commonwealth may terminate the delayed or interrupted Services or (in the event said Services represent a material portion of all of the Services) the Commonwealth may terminate the Term of this Agreement, by sending within thirty (30) days following such fifteen (15) consecutive day period, in either case, a Termination Notice to Vendor, specifying whether such termination is a partial or a total termination. In the

event the Commonwealth terminates the Term or any portion of the Services pursuant to this Section [11.5](#), the applicable Exit Fee shall be payable by the Commonwealth to Vendor.

11.6 Termination by the Commonwealth for Lack of Funds

The Commonwealth may, by sending a Termination Notice to Vendor, terminate any of the Deliverables or Services that Vendor is providing or performing pursuant to this Agreement (or any portion of any of the foregoing, such as a Statement of Work or subcomponent), to the extent that such Deliverables or Services are directly or indirectly involved in the performance of a function with regard to which funds are not allocated, appropriated, or available to the Commonwealth for the continued performance of such Deliverables or Services, in accordance with Section [8.8](#) of this Agreement. In the event the Commonwealth terminates any such Deliverables or Services pursuant to this Section [11.6](#), no Exit Fee shall be payable by the Commonwealth to Vendor.

11.7 Termination for Downgraded Financial Condition

11.8 Suspension of Work

The Commonwealth may, at any time based upon the failure to obtain the appropriation of sufficient government funds for the payment of the Services, on a reasonable and good faith basis, immediately suspend, delay, interrupt, or stop the performance of any or all of the Services being or to be provided by Vendor pursuant to this Agreement, for a cumulative period of not to exceed more than forty-five (45) days within any contiguous twelve (12) month period, upon sending written notice to Vendor specifying the affected Services (each such suspension, delay, interruption, or stoppage, a “Suspension”). Any such Suspension shall remain in effect until the Commonwealth either: (i) sends Vendor a Termination Notice indicating that any or all of the suspended Services shall be terminated pursuant to the terms of Section [11](#) hereof, with the provision of any suspended Services not thereby terminated being immediately resumed by Vendor; or (ii) sends Vendor written notice canceling such Suspension and indicating when and how Vendor shall resume performance of the suspended Services. In the event of any such Suspension as described in this Section [11.8](#): (i) the Commonwealth shall reimburse Vendor for the Fees (minus the costs not reduced or avoided as set forth in (ii) below) and for any additional costs that are reasonably and actually incurred by Vendor as a direct result of such Suspension or resuming of the Services, (ii) the Vendor shall exercise all commercially reasonable efforts to reduce or avoid costs during such Suspension, and shall reduce the Fees by the amount of such costs; (iii) Vendor shall not credit the Commonwealth for the Managed Employees, Performance Credits or Deliverable Credits; and (iii) the Parties shall mutually agree upon reasonable and appropriate adjustments to any affected Critical Milestones or other milestone dates, and any other schedule, deadline, or timeframe specified in this Agreement, to the extent affected by such Suspension.

11.9 Effect of Ending of Term

The expiration or termination of the Term shall constitute a termination of this Agreement, but the following terms and conditions of this Agreement shall survive and continue in force and effect until fulfilled. In the event the Commonwealth elects to terminate all or any particular portion of the Services pursuant to the terms of this Section [11](#): (i) Vendor shall perform its Disentanglement obligations under Section [12](#), to the extent applicable to the portion of the Services being terminated; and (ii) Vendor shall be entitled to the unpaid Fees for Services actually rendered up to and including the applicable Termination Date, in accordance with Schedule 8.1.

12. DISENTANGLEMENT

12.1 General Obligations

In connection with any expiration or termination of the Agreement, or with termination of Vendor's performance of the Services, or any portion thereof (e.g., a Statement of Work or subcomponent), then being provided hereunder, Vendor shall take the actions described in this Section [12](#) and the applicable Disentanglement Transition Plan (as defined below) (all such actions, collectively, a "Disentanglement"). Vendor shall provide for the prompt and orderly conclusion of all work related to the Services being terminated, as the Commonwealth may direct, including completion or partial completion and documentation of all work in progress as requested by the Commonwealth. Vendor shall cooperate fully with the Commonwealth and its other third-party service providers, and shall take and perform such additional tasks as are necessary, appropriate, or reasonably requested by the Commonwealth, whether during the Term or during Disentanglement, to ensure a timely and smooth Disentanglement, in accordance with this Section [12](#), including completely fulfilling all of Vendor's obligations under this Section [12](#) to the reasonable satisfaction of the Commonwealth. All actions performed and services provided by Vendor related to Disentanglement shall be deemed Services and all such Disentanglement Services performed by Vendor shall be at no additional cost to the Commonwealth beyond what the Commonwealth is paying. For the Services, to the extent that such Disentanglement Services can be performed by Vendor using personnel and resources otherwise dedicated to the performance of the Services for the Commonwealth, without impacting the Service Levels or Vendor's other obligations hereunder. To the extent that Vendor requires additional or different personnel or resources to perform such Disentanglement Services, Vendor will charge the Commonwealth according to the rates set forth in Schedule [10.1](#), if applicable, or at rates or charging methodology agreed upon by the Parties. Vendor's obligation to provide such Disentanglement Services shall not cease until the last day of the a Disentanglement Period.. . Subject to mutual written agreement, For the first year after such a completion of the Disentanglement Period, the Commonwealth shall be entitled to request that Vendor perform additional Initiatives for the Commonwealth

12.2 Preparation for Disentanglement

12.2.1 Data and Documentation

At any time or times during the Term, Vendor shall deliver to the Commonwealth or the Commonwealth's designee, promptly upon the Commonwealth's request, all Documentation and data related to the Commonwealth or the performance of the Services as is necessary to ensure a timely and smooth Disentanglement, including all the Commonwealth Data, then held by Vendor, except for documents and data that are legally privileged in the hands of Vendor or third parties, and Vendor and third parties shall securely destroy, in accordance with the Commonwealth's data and documentation destruction policies, all copies thereof not turned over to the Commonwealth, all at no charge to the Commonwealth. Notwithstanding the forgoing, Vendor shall have no responsibility to provide Documentation regarding its noncommercially available hardware, software, or services, or its Vendor Restricted Software.

12.2.2 Preparation for Successor to this Agreement

At any time or times during the Term, at the written request of the Commonwealth, Vendor shall provide the Commonwealth with any information that the Commonwealth is entitled to receive under this Agreement that the Commonwealth desires to use in preparing a request for proposal to solicit responses, or responding to proposals, for the purpose of entering into an agreement that would constitute the successor to this Agreement. Notwithstanding the forgoing, Vendor shall have no responsibility to provide Documentation regarding its noncommercially available hardware, software, or services, or its Vendor Restricted Software.

12.3 Disentanglement Process

12.3.1 Disentanglement Commencement Date

The Disentanglement process shall begin on the date that any Termination Notice is delivered, in the event that the Term of this Agreement or any portion of the Services is terminated by either Party, or, if no Termination Notice has yet been delivered, on the date that is nine (9) months prior to the expiration of the Term (as applicable, the "Disentanglement Commencement Date") and, unless the Parties subsequently agree in writing to renew the Term, Vendor shall continue to provide Disentanglement Services, in accordance with this Section [12](#) or as the Commonwealth reasonably requests, until a Disentanglement has been completed, a period that may last up to one (1) year after the Termination Date specified in such Termination Notice or the expiration date, as applicable (the "Disentanglement Period").

12.3.2 Disentanglement Transition Plan

As soon as reasonably practicable after the Disentanglement Commencement Date, Vendor and the Commonwealth shall confer and negotiate in good faith to reach mutual agreement on and document within ninety (90) days after such Disentanglement Transition Date, a written plan (a "Disentanglement Transition Plan") that: (i) estimates the

anticipated duration of the Disentanglement; (ii) allocates responsibilities for Disentanglement and transition of the Services among the Parties; (iii) sets forth in reasonable detail the respective services to be provided by each of the Parties, including all Disentanglement Services to be performed by Vendor, provided that such plan shall not lessen or eliminate Vendor's obligations under this Agreement to provide all Disentanglement Services reasonably requested by the Commonwealth except to the extent otherwise expressly agreed ; and (iv) if applicable, sets forth the assets, licenses, leases, contracts and other resources then in the possession of, or held in the name of, Vendor that need to be transferred and/or assigned to the Commonwealth or its designee to facilitate or enable the performance of the Services or the use, operation, support, or maintenance of any Systems. If the Disentanglement Transition Plan relates to Implementation Services, to the extent applicable, such process shall include other third-party service-providers of the Commonwealth and the Disentanglement Transition Plan shall address the responsibilities of and services to be provided by such third-party service-providers. Vendor shall update such Disentanglement Transition Plan from time to time, as appropriate and subject to the Commonwealth's reasonable approval, in order to address any impact of any unexpected changes in the Services or the observed Service Level performance, or the hardware, Software, or other resources used to provide the Services, as such Disentanglement progresses. .

12.4 Specific Disentanglement Obligations

As per section 6.3.1 of this proposal, confidentiality has been granted for this section and has thus been omitted from this redact version of IBM's August 5, 2005 detailed proposal submission to the Commonwealth of Virginia.

13. DEFAULT

13.1 Limitation of Liability and Disclaimers

As per section 6.3.1 of this proposal, confidentiality has been granted for this section and has thus been omitted from this redact version of IBM's August 5, 2005 detailed proposal submission to the Commonwealth of Virginia.

13.2 Force Majeure Events

If a Force Majeure Event is a material contributing cause of a Party's failure to perform any of its obligations hereunder, such obligations, after notification by such Party to the other Party, shall be deemed suspended to the extent such obligations are affected by such Force Majeure Event, until the Force Majeure Event has ended and a reasonable period of time for overcoming the effects thereof has passed, except that if a Force Majeure Event results in Vendor being unable to perform for a period of time exceeding ten (10) or more consecutive days, some or all of the Services in accordance with the terms hereof, the Commonwealth: (i) shall not be required to pay for any such unperformed Services; (ii) shall be entitled, without the payment of the fees for the affected Services described in Section [11.2](#), to engage an alternate provider, on an interim basis, to perform the affected Services that Vendor is unable to perform as a result of the Force Majeure Event, until such time as Vendor is able again to perform the Services in accordance with the terms hereof, and shall be entitled during such interim period to reimbursement from Vendor (with such reimbursement not to cover any period to the extent in excess of ninety (90) consecutive days) for the reasonable costs and expenses of such provision of Services to the extent that said costs and expenses exceed the amount that the Commonwealth would have paid Vendor hereunder for such Services; (iii) shall be entitled to receive a priority from Vendor as to Vendor's resources devoted to returning Vendor to full performance of all Services hereunder, that is equal to or greater than the priority that Vendor allocates to other of its customers with whom it has agreements that are similar to this Agreement and that are similarly situated; and (iv) if the suspension of Services lasts more than thirty (30) days shall have the right to terminate affected portion of the Services in accordance with the terms of Section [11.5](#). Both Parties shall use all commercially reasonable efforts to minimize delays and mitigate adverse circumstances that occur due to a Force Majeure Event. Notwithstanding the foregoing, a Force Majeure Event shall not relieve or excuse either Party from its obligations hereunder: (a) that are not directly affected by such Force Majeure Event; or (b) to the extent that such Force Majeure Event is caused by that Party's or its Subcontractors') failure to perform obligations in accordance with this Agreement

13.3 Savings Clause

Notwithstanding anything to the contrary contained in this Agreement, should the Commonwealth fail to perform any of its obligations under this Agreement, including without limitation those set forth in a Statement of Work, Vendor shall not be responsible for any delay, cost increase or other consequences due to such failure, and the Commonwealth shall reimburse Vendor for any costs or expenses incurred due to such failure, including but not limited to payment at Vendor's professional fee billing rates for the personnel that must be kept available during any delay caused by the Commonwealth's non-performance. Vendor will use reasonable efforts to mitigate such costs or expenses. Any Vendor deadline that is affected by any such Commonwealth default shall be extended by an amount of time equal to the length of such failure plus an additional period of time, if reasonably necessary, to compensate for such default.,

14. REPORTS

14.1 Reports

As part of the Services, Vendor shall furnish the Commonwealth with reports in the form, and with the frequency, and covering the information, described in Schedule [14.1](#), or as otherwise reasonably requested by the Commonwealth, in writing pursuant to the Change Management Procedure, from time to time. As provided in Schedule [14.1](#), such reports shall address such issues as Vendor's performance of the Services, Vendor's compliance with the terms and conditions of this Agreement, , and human resources. In addition, in the event that Vendor, at any time during the Term, fails to perform the Services in accordance with the Service Levels, Vendor shall promptly provide the Commonwealth with such additional reports, in such form, and with such frequency, as the Commonwealth shall reasonably request , pursuant to the Change Management Procedure. On an annual basis, the Parties shall discuss the requirements set forth in Schedule [14.1](#) and shall modify such requirements in such a manner as they deem appropriate and mutually agree to in writing. Except as otherwise provided in Schedule [14.1](#), Vendor shall furnish all reports to the Commonwealth in an electronic form. Vendor shall furnish the Commonwealth with generally publicly available materials and applicable research and development information, such as published materials and industry studies conducted for or by Vendor, that come to the attention of Vendor's Relationship Manager and pertain to the Services, and that Vendor's Relationship Manager reasonably believes would assist the Commonwealth in setting its IT- and business process- related policies or requirements. Vendor's Relationship Manager shall also use commercially reasonable efforts to advise the Commonwealth of other relevant matters of a material nature, including those that have a cost associated with them but that reasonably might be helpful to the Commonwealth in setting or revising such policies or requirements.

14.2 Additional Commitments

To the extent that it is permitted by the applicable third parties without incurring additional cost, Vendor shall furnish the Commonwealth with generally publicly available existing and future research and development resources (e.g., published materials, and industry studies conducted for or by Vendor) that come to Vendor's attention, that pertain or are related to the Services, and that would reasonably be of assistance to the Commonwealth in setting its policies or requirements under this Agreement.

15. RECORDKEEPING AND AUDIT RIGHTS

15.1 Recordkeeping

15.1.1 General Obligations

Vendor shall at all times maintain true, complete, and accurate records and books of account with respect to all aspects of Vendor's performance and invoices under this Agreement, and complying in all respects with all applicable federal, state, and local laws, regulations, and ordinances applicable to Vendor as an information technology services provider. Such records and books of account, and the accounting controls related thereto shall be

considered Vendor Confidential Information: (i) shall be prepared in such a manner as to permit the Commonwealth's verification of Vendor's invoices (ii) shall be maintained by Vendor at a principal business location within the Commonwealth. The Commonwealth, upon prior written notice, may examine such records to the extent necessary for the Commonwealth to verify the accuracy of Vendor's invoices or Vendor's performance under this Agreement, at any reasonable time during normal business hours. In the event that Vendor ceases to exist as a legal entity, such records and books pertaining to this Agreement shall be forwarded to the surviving entity in a merger or acquisition, or in the event of liquidation, to the Commonwealth. Vendor shall retain for a period of five (5) years after the date of final payment for Services rendered hereunder (including any Disentanglement Services), or such longer period as may be required by applicable law or regulation, all records and information required to verify amounts invoiced under this Agreement and Vendor's and its Subcontractors' compliance with applicable law and regulation in its performance under this Agreement. The obligations and requirements of this Section shall apply to all Vendor Subcontractors.

15.1.2 Access and Remedy

The Commonwealth, or the Commonwealth's Auditors, shall be granted access to the aforesaid records for the purpose of verifying the accuracy of Vendor's invoicing and contractual compliance, during normal business hours, upon reasonable notice to Vendor. ..., During normal business hours and with reasonable advance notice, Vendor shall grant the Commonwealth and its representatives access to all of the Vendor Personnel and to the relevant portion of Vendor's books, records, documents, data, or information, as they relate to amounts invoiced, invoices submitted, or the extent of Vendor's compliance with this Agreement, or as such access to personnel, books, records, documents, data, and information may be required in order for the Commonwealth to ascertain any facts relevant to determining the accuracy of Vendor's invoicing hereunder, including facts with regard to verification of Fees (and components and calculations thereof). In the event that any such verification reveals an overcharge (net of any undercharges) to the Commonwealth with respect to the Fees and Vendor agrees,, then: (i) Vendor shall promptly refund such overcharge; (ii) if such overcharge represents, as to any invoice, more than five percent (5%) of the amounts that the Commonwealth should have been charged in aggregate under invoices for the prior year,, then Vendor shall promptly refund to the Commonwealth, or at the Commonwealth's option, issue to the Commonwealth a credit for, the cost of such audit; and (iii) Vendor shall fully cooperate with appropriate Commonwealth personnel, or the Commonwealth's Auditors, in reviewing, evaluating, and, to the extent necessary, revising Vendor's internal controls, promptly implementing any recommended, material changes agreed to by Vendor.

15.1.3 Controls, Policies, and Procedures

Subject to the Change Management Procedure, Vendor shall at all times maintain such controls, policies, and procedures, as reasonably requested by the Commonwealth or the Commonwealth's Auditors. Subject to the Change Management Procedure, Vendor shall promptly address any agreed-to audit-control issues or weaknesses identified during any the Commonwealth audit. If specific agreed-to audit recommendations by the Commonwealth's Auditors are not implemented by Vendor, then Vendor should implement such alternative steps

as are reasonably satisfactory to the Commonwealth for the purposes of minimizing or eliminating the risks identified in any such audit.

15.1.4 SAS 70 Type II

On a Commonwealth fiscal year basis (7/1 – 6/30) (“Fiscal Year”), Vendor and all Key Subcontractors shall require its Auditors to conduct an examination of the controls placed in operation and a test of operating effectiveness, as defined by Statement on Auditing Standards No. 70, Reports on the Processing of Transactions by Service Organizations (“SAS 70”), of the Services and issue a report thereon (a “Type II Report”) for the applicable Fiscal Year. Vendor shall submit the proposed control objectives to the Commonwealth for approval subject to the Change Management Procedure prior to conducting the audit. Vendor shall deliver to the Commonwealth five (5) copies of the Type II Report within two (2) months after conducting the SAS 70 assessment for a Fiscal Year and Vendor shall prepare and implement if necessary, a corrective action plan to correct any deficiencies or resolve any problems identified in such report. A copy of the corrective action plan shall be provided to the Commonwealth as soon as reasonably practical as well. In the event that the Commonwealth subsequently and reasonably incurs charges in excess of Seven Thousand Five Hundred Dollars (\$7,500) from its Auditors in connection with an audit of the Commonwealth’s consolidated financial statements, then, to the extent that such excess charges result from additional audit procedures that such Auditors had to perform because of inadequacies identified in a previously delivered Type II Report that have not been adequately addressed by Vendor Vendor shall promptly reimburse the Commonwealth for such excess charges, up to a maximum of Twenty-Five Thousand Dollars (\$25,000) for each Fiscal Year. In no event shall this [Section 15.1.4](#) in any way modify or reduce Vendor’s Auditors’ responsibilities under SAS 70. Notwithstanding anything to the contrary in this Agreement, the Commonwealth agrees that any audit reports provided by Vendor do not constitute certifications or attestations under the Sarbanes-Oxley Act of 2002 or otherwise.

15.2 Financial Audits

Each Contract Year, Vendor shall require its Auditors to conduct an examination of Vendor’s payment and invoicing processes related to delivery of Services under this Agreement with scope and objectives to be approved by the Commonwealth in advance subject to the Change Management Procedure. Vendor also shall require its Subcontractors to conduct such audits. This audit shall be conducted for the previous fiscal Year ending June 30, 20xx. For the first Contract Year this may be only for a partial year. Vendor shall, and shall require its Subcontractors to, deliver to the Commonwealth five (5) copies of such audit report as soon as reasonably practical and Vendor shall prepare and implement a corrective action plan to correct any deficiencies or resolve any problems identified in such report. A copy of the corrective action plan shall be provided to the Commonwealth as soon as reasonably practical as well. In addition, Vendor shall, at the Commonwealth’s request, allow the Commonwealth’s Auditors to audit Vendor’s and its Subcontractors’ records to the extent necessary to verify any amounts payable by the Commonwealth hereunder, including those records related to performance obtained with regard to measured Service Levels. Vendor shall

provide the Commonwealth's Auditors with reasonable access to such information relating to this Agreement and Vendor's business and its Subcontractors' businesses as may be necessary to confirm the accuracy of Vendor's invoices, documents, and other information supporting such invoices. The Commonwealth's Auditors shall perform such audits only after executing nondisclosure agreements reasonably satisfactory to Vendor and shall not be Vendor Competitors. All such audits shall be conducted during normal business hours, with reasonable advance notice, in compliance with Vendor's security requirements. **15.3 Operational Audits**

Each Contract Year, Vendor shall require its Auditors to conduct an examination of Vendor's compliance with this Agreement with scope and objectives to be approved by the Commonwealth in advance subject to the Change Management Procedure. and with particular emphasis on information security components. Vendor also shall require its Subcontractors providing Services, to conduct such compliance audits. This audit shall be conducted for the previous fiscal Year ending June 30, 20xx. For the first Contract Year this may be only for a partial year. Vendor shall, and shall require its Subcontractors to, deliver to the Commonwealth five (5) copies of such audit report as soon as reasonably practical and Vendor shall prepare and implement a corrective action plan to correct any deficiencies or resolve any problems identified in such report as soon as reasonably practical. A copy of the corrective action plan shall be provided to the Commonwealth by as soon as reasonably practical as well. In addition, at any time, and from time to time, during the Term, the Commonwealth may engage such Auditors as it shall deem appropriate (except that such Auditors shall not be Vendor Competitors) to conduct an audit of Vendor's and its Subcontractors' practices, the facilities used by Vendor or Vendor's Subcontractors to provide the Services, and related operational matters (including audits of Vendor's legal compliance with this Agreement and Vendor's security policies and practices with regard to data access and control related to the Services)) in order to verify compliance with the terms of this Agreement. Any such audit shall be conducted in a reasonable manner and after reasonable advance notice (except that no notice shall be required with respect to a security audit). For purposes of such audit, Vendor shall, and shall cause its Subcontractors to, grant the Commonwealth and its representatives, during normal business hours and upon reasonable notice, and to the relevant portion of Vendor's and its Subcontractors' books, records, documents, data, and information, as they relate to this Agreement, or performance hereunder (other than cost or pricing information). Vendor shall, and shall cause its Subcontractors to, provide the Commonwealth, or its authorized representatives, with such information and assistance as are reasonably requested in order to perform such audits, provided that the Parties shall endeavor to arrange such assistance in such a way that it does not interfere with the performance of Vendor's duties and obligations hereunder. If any such audit reveals an inadequacy or insufficiency of Vendor's performance, including performance in connection with any security obligations of Vendor as set forth in this Agreement and Vendor agrees, Vendor shall promptly develop and provide to the Commonwealth a reasonable and detailed corrective action plan and promptly thereafter implement such plan in accordance with its terms. Any of the Commonwealth's Auditors performing such an audit shall do so only after executing nondisclosure agreements reasonably satisfactory to Vendor. Vendor shall use all commercially reasonable efforts to incorporate the substance of the foregoing provisions of this Section [15.3](#) regarding audit rights (substituting the name of the Subcontractor for that of Vendor) into any

written agreement between Vendor and each Subcontractor. Nothing in this Section [15.3](#) shall in any way limit the Commonwealth's rights under Section [15.2](#).

16. CONFIDENTIALITY

16.1 Protection of Confidential Information

Both Parties shall:

(b) take steps to prevent the use, disclosure, dissemination, or copying of the Confidential Information of the other Party other than as necessary for the Party to perform its obligations under this Agreement, including developing, implementing, maintaining, and enforcing appropriate policies and procedures to safeguard the Confidential Information of the other Party;

(c) use the same care to prevent disclosure of the Confidential Information of the the other Party to third parties as it employs to avoid disclosure, publication, or dissemination of its own confidential information of a similar nature, but in no event less than a reasonable standard of care;

(d) use the Confidential Information of the other Party solely as necessary and appropriate for the purpose of performing its obligations under this Agreement;

(e) except as provided hereunder not acquire any express or implied right or license to any Intellectual Property Right or other right, or assert any lien against, the Confidential Information of the Commonwealth;

(f) upon the request of the other Party promptly return, or provide a copy of, as the other Party directs, Confidential Information of the other Party(provided that Vendor may retain such Confidential Information as it requires in order to perform the Services for so long as it is required to perform such Services); and

(g) use all commercially reasonable efforts to inform its employees, agents, and subcontractors who perform duties with respect to this Agreement about the restrictions with regard to Confidential Information set forth in this Section [16](#).

Notwithstanding anything to the contrary contained elsewhere in this Section [16](#), Vendor may disclose Confidential Information of the Commonwealth to its employees, agents, and subcontractors who have: (i) a bona fide need to know such Confidential Information in order to perform their assigned duties; and (ii) a legal duty to protect the Confidential Information that is substantially equivalent to the obligations of confidentiality imposed upon Vendor hereunder. Vendor assumes full responsibility for the acts or omissions of its subcontractors and employees with respect to Confidential Information of the Commonwealth.

16.2 Required Disclosure

Vendor may disclose Confidential Information to the extent disclosure is required by law or by order of a court or governmental agency. Vendor shall use all commercially reasonable efforts to: (i) maintain the confidentiality of the Confidential Information by giving the Commonwealth prompt notice in order that it may intercede in such process to contest such disclosure; and (ii) cooperate with the Commonwealth to protect the confidentiality of such Confidential Information. The Commonwealth (or to whom such Confidential Information otherwise pertains) shall have the right to obtain a protective order or otherwise protect the confidentiality of such Confidential Information. Each Party shall be responsible for its own costs with respect to the performance of its obligations under this Section [16.2](#). Notwithstanding anything to the contrary contained elsewhere in this Agreement, either Party may disclose the existence of this Agreement, or the terms of this Agreement, to the extent such disclosure is expressly required by mandatory law, provided that the disclosing Party shall use all reasonable efforts to obtain confidentiality treatment for any such disclosures.

16.3 Notification

Each Party shall notify the other Party as soon as possible in the event of any known disclosure or loss of Confidential Information other than as permitted by this Agreement.

16.4 Injunctive Relief

Vendor acknowledges that any breach of any provision of this Section [16](#) by Vendor, or by its personnel, agents, or subcontractors, may cause immediate and irreparable injury to the Commonwealth that cannot be adequately compensated for in damages, and that, in the event of any such breach and in addition to all other remedies available at law or in equity, the Commonwealth shall be entitled to seek injunctive relief from any court of competent jurisdiction, without bond or other security.

16.5 Return of Confidential Information

Unless expressly authorized by this Agreement to retain the the other Party's Confidential Information, and upon either termination or expiration of the Term of this Agreement or the request of the the other Party ,each Party shall promptly return or destroy, at the other Party's option, the other Party's Confidential Information and all copies thereof, including, to the extent containing Confidential Information, materials prepared in whole or in part based on such Confidential Information, and all copies thereof. Following such return or destruction, an officer of a Party shall certify to the other Party that it no longer has in its possession or under its control any of such Confidential Information of the other Party in any form whatsoever, or any copy thereof. Notwithstanding anything to the contrary in Section [16.7](#), to the extent and for so long as such return or destruction is infeasible (e.g., with regard to Confidential Information of a Party retained in the memories of the other Party's employees), the protections of this Section [16](#) shall continue to apply to such Confidential Information subject to Section [9.5](#).

16.6 Confidentiality Agreements

Vendor shall require each of its agents and Subcontractors providing Services hereunder to execute an agreement, in form and substance at least as restrictive as the confidentiality terms contained herein (a “Confidentiality Agreement”), under which such agents or Subcontractors agree to appropriately protect the Commonwealth’s Confidential Information and to fulfill any other confidentiality obligations necessary to the performance of Vendor’s obligations hereunder. Vendor covenants that each of its employees performing Services shall be subject to the terms of an employment agreement that requires him or her to protect Vendor’s clients’ confidential information, including the Confidential Information of the Commonwealth, and that offers no less degree of protection than that which is required hereunder.

16.7 Duration

The obligations of the Parties with respect to Confidential Information, as are set forth in this Section [16](#), shall remain in force and effect at all times during the Term and (i) with respect to Confidential Information that constitutes a trade secret under applicable law, for so long as such trade secret status is maintained; and (ii) with respect to Confidential Information that does not constitute a trade secret, for three (3) years after termination or expiration of the Term of this Agreement (or for the maximum amount of time permitted under applicable law, if shorter than three (3) years).

17. LEGAL COMPLIANCE

17.1 General

Vendor shall at all times perform its obligations hereunder in compliance in all material respects with all applicable federal, state, local, and foreign laws and regulations of all applicable foreign and domestic jurisdictions (in the case of Vendor, as applicable to Vendor in its provision of Services as an information technology services provider; in the case of the Commonwealth, as applicable to the Commonwealth in its receipt or use of the Services).

17.2 Federal Funding

Without limiting the generality of the foregoing section, Vendor shall at all times comply with all applicable federal laws, rules, regulations, guidelines, and mandates relating to the allocation of federal funds provided or granted to the Commonwealth. Vendor shall maintain familiarity with such federal laws, rules, regulations, guidelines, and mandates and shall use commercially reasonable efforts to notify the Commonwealth of any new or modified federal laws, rules, regulations, guidelines, and mandates that impact Vendor’s provision of the Services ; provided that the Commonwealth acknowledges that Vendor does not provide legal advice or services

17.3 Permits and Licenses

Except for approvals, permissions, permits, or licenses required by state or federal statute, ordinance, regulation, or other law to be obtained by the Commonwealth (including those required, if any, to permit the Commonwealth to enter into this Agreement), or as expressly provided otherwise elsewhere in this Agreement, Vendor shall obtain and maintain, at its own expense, all governmental approvals, permissions, permits, licenses, and other forms of documentation required in order for the Vendor to comply with all existing state or federal statutes, ordinances, regulations, and other laws that are applicable to Vendor's performance of Services hereunder. The Commonwealth reserves the right to reasonably request and review all such applications, permits, and licenses obtained exclusively for the performance of Services hereunder and Vendor shall promptly comply and cooperate with any such request. Notwithstanding the foregoing, the Commonwealth shall be solely responsible for monitoring, and compliance with, the substantive laws, rules, and regulations applicable to its business, activities, or operations.

17.4 Prevailing Wage Rates

To the extent required of Vendor by law and only to the extent the Commonwealth has expressly identified in Schedule 8.1 the applicability of this requirement as to a specific aspect of the Services, Vendor shall pay to each of its employees, and shall require each Subcontractor to pay to such Subcontractor's employees, the general prevailing rate of wages in the locality in which work is to be performed, according to each craft or type of workperson or employee performing such work and in accordance with the applicable published wage rates issued by the appropriate governmental agency. All contractors working for the Commonwealth, including Vendor and its Subcontractors, must abide by the all applicable state and local laws, rules, regulations, and ordinances regarding employment, wage rates, and employment of in-state residents.

17.5 Debarment and Suspension

Vendor certifies that to the knowledge of Vendor's Relationship Manager, as of the Effective Date in the United States, it, its Affiliate and its Subcontractors, including any officers or principals therefor:

Are not presently debarred, or suspended, from covered transactions by any state or federal department or agency;

Have not, within the three (3) year period preceding this Agreement, been convicted of or had a civil judgment rendered against any of them by a governmental entity for: the commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, State, or local) transaction; violation of federal or State anti-trust statutes; or the commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

Are not presently indicted or otherwise criminally or civilly charged by a governmental entity (federal, State or local) with commission of any of the offenses described in paragraph 0; and

Have not, within the three (3) year period preceding this Agreement, had one or more public transaction (federal, State or local) terminated for cause or default.

During the Term of this Agreement, in the event Vendor, or any of its Subcontractors, including any officers or principals thereof, is or becomes debarred or, suspended, from covered transactions by any governmental entity (federal, State or local) or are indicted, charged or convicted, or have a civil judgment rendered against them by such entity for any offenses described in subsection 0, above, then: Vendor shall immediately provide the Commonwealth with a reasonably detailed written notice of such fact..

17.6 Nonvisual Access to Technology

To the extent required by law of Vendor, without exemption or alternative, in its performance of the Services as an information technology services provider, Vendor's provision of all Vendor's information technology which, pursuant to this Agreement, is provided or upgraded by Vendor for the use of the Commonwealth shall comply with Section 508 of the Rehabilitation Act (29 U.S.C. 794d), as amended, and as required by Va. Code § 2.2-2012(A). If requested, Vendor shall explain how such compliance is achieved. .

a.

17.7 Non-Discrimination

During the Term, Vendor hereby agrees as follows:

Vendor will not discriminate against any employee or applicant for employment because of race, religion, color, sex or national origin, except where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of Vendor. Vendor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause or similar alternative provisions

Vendor will, in all solicitations or advertisements for employees placed by or on behalf of Vendor, state that such Vendor is an equal opportunity employer. However, notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting the requirements of Va. Code § 2.2.-4201.

Vendor shall include the provisions of subdivisions (i) and (ii) in every subcontract or purchase order of over \$10,000 for the Services hereunder, so that such provisions shall be binding upon each Subcontractor.

18. REPRESENTATIONS, WARRANTIES, AND COVENANTS

18.1 By Vendor

18.1.1. Preparation

Vendor acknowledges that (i) it has had sufficient access to, and opportunity to inspect, all material components, workings, capabilities, procedures, and capacities of the Commonwealth's networks, equipment, hardware, and Software associated with the provision of the Services and Deliverables, and for full and complete analysis of the Commonwealth's requirements in connection therewith (as specified in this Agreement); (ii) it has performed sufficient due diligence investigations regarding the scope and substance of the Services and the Deliverables; (iii) it has received sufficient answers to all questions that it has presented to the Commonwealth regarding the scope and substance of the Services and the Deliverables; and (iv) it is capable in all respects of providing the Services and Deliverables in accordance with this Agreement. Vendor hereby waives and releases any and all claims that it now has or hereafter may have against the Commonwealth based upon any inaccuracy or incompleteness of the information it has received with regard to the scope and substance of the Services or the Deliverables. Further, Vendor covenants that it shall not seek any judicial rescission, cancellation, termination, reformation, or modification of this Agreement or any provision hereof, nor any adjustment in the Fees to be paid for the Services, based upon any such inaccuracy or incompleteness of information except where such information was withheld or misrepresented by the Commonwealth.

18.1.2. Services

Vendor warrants that: (i) the Services shall be performed, and all Deliverables prepared and delivered, in a timely, professional, workperson-like, diligent, efficient manner and in accordance with the recognized professional standards and practices of quality and integrity in the industry and with the performance standards and Specifications provided or required by this Agreement; (ii) it shall perform all Services required to be performed hereunder in accordance with this Agreement and that its charges for doing so shall consist, solely and entirely, of the Fees, unless otherwise specifically agreed to in writing by the Parties; and (iii) Vendor Personnel (including Vendor's Relationship Manager and the Key Personnel), Vendor's Subcontractors, and any other Person or individual employed or engaged by Vendor to perform services for Vendor in performance of this Agreement, shall be fully familiar with the technology and methodologies used to perform the Services or, and shall have the requisite ability, expertise, knowledge, and skill, as appropriate to the duties assigned, to perform their Services or provide the Deliverables in such a manner and in accordance with such standards, practices, and Specifications. Vendor further warrants that no amendment to this Agreement, nor any additional cost or expense other than the Fees, as set forth herein, shall be necessary or required during the Term in order for Vendor to perform the Services without any changes in accordance with all terms and conditions of this Agreement (including the Service Levels).

18.1.3. Documentation

Vendor warrants that all Documentation concerning the Services or the Deliverables reasonably and accurately describe such Services or Deliverables so as to enable a reasonably capable professional to readily understand them...

18.1.4. Deliverables

Vendor represents and warrants that the Deliverables and any other goods provided under this Agreement are and shall be, except as otherwise provided: free of liens or encumbrances; Vendor further warrants and covenants that unless otherwise provided the newly created software Deliverables (other than such Deliverables created on a time and materials basis) shall comply with the Documentation and the Specifications in all material respects or as otherwise agreed by the Parties for a period of ninety (90) days from delivery. Vendor shall, , use commercially reasonable efforts to correct any failure of the Deliverables to so comply. If Vendor fails or is unable to repair or replace such non-conforming Deliverables, the Commonwealth may obtain from Vendor the an equitable refund for the applicable non-conforming portion of such Deliverable.

18.1.5. Proprietary Rights Infringement

To the extent expressly permitted by the applicable third party agreement, Vendor warrants that it shall pass through to the Commonwealth all applicable covenants, representations, or undertakings of any third party software or hardware provider used by Vendor with regard to infringement or misappropriation of Intellectual Property Rights that is provided by Vendor through such third party and that is used exclusively in connection with this Agreement.

18.1.6. Authority and Approvals

Vendor represents that: (i) it is a corporation duly formed and in good standing under the laws of the [State of __New York_]; (ii) it is qualified and registered to transact business in the [State of New York _____] and all locations where the performance of its obligations hereunder would require such qualification; (iii) it has all necessary powers, and authority to enter into and perform under this Agreement; (iv) the execution, delivery, and performance of this Agreement by Vendor have been duly authorized by all necessary corporate action; (v) the individual executing this Agreement on behalf of and for Vendor is an authorized agent of Vendor who has actual authority to bind Vendor to each and every Section and obligation of this Agreement and that all requirements of Vendor have been fulfilled to bestow such actual authority upon such individual; (vi) the execution and performance of this Agreement by Vendor shall not violate any domestic or foreign law, statute, or regulation applicable to Vendor as an information technology services provider and shall not breach any agreement, covenant, court order, judgment, or decree to which Vendor is a party or by which it is bound; (vii) it has, and covenants that it shall maintain in effect, all governmental licenses and permits necessary for it to provide the Services and Deliverables as contemplated by this Agreement; and (viii) that Vendor owns or leases, and covenants that it shall own or lease, or

have the right to use, free and clear of all liens and encumbrances, other than lessors' interests, or security interests of Vendor's lenders, appropriate right, title, or interest in and to the tangible property that Vendor intends to use or uses to provide the Services and Deliverables in accordance herewith.

18.1.7. Pending Litigation

Vendor represents that, as of the Effective Date: (i) there is no outstanding civil or criminal litigation, or arbitrated matter, , in any forum, to which Vendor or any of its Affiliates is a party that, if decided unfavorably to Vendor or its Affiliates, would reasonably be expected to have a material adverse effect on Vendor's ability to fulfill its obligations hereunder; and (ii) Vendor knows of no basis that might give rise to any such litigation, or arbitration, in the foreseeable future. Vendor warrants that it shall notify the Commonwealth, within fifteen (15) days after Vendor first learns of any such litigation, or arbitration, will have the effect described in the first sentence of this Section. Vendor further warrants that , unless prohibited or restricted by law and subject to confidentiality requirements it shall notify the Commonwealth by electronic mail within fifteen (15) days after Vendor is served with any process in connection with this Agreement, including any subpoena of Vendor's records, and that it shall send a written notice of any such service, together with a copy of the same, to the Commonwealth within fifteen (15) days after receiving such service, in accordance with the notice provisions of Section [24.4](#).

18.1.8. Compliance with Laws

Vendor warrants that, in performing the Services and preparing and providing the Deliverables that, Vendor shall comply, with all applicable laws and regulations, including: (i) all applicable immigration and labor laws and regulations; (ii) all laws and regulations, related to fair employment, employment of the handicapped and minorities and women, and the treatment of all employees without regard to discrimination by reason of race, color, religion, sex, national origin, or physical handicap; (iii) all applicable data protection, nondisclosure, and privacy laws of any relevant jurisdiction; and (iv) all applicable laws of the Commonwealth.

18.1.9. Existing Violations

Vendor represents that, as of the Effective Date, it is not in violation or material non-compliance with any laws, ordinances, statutes, rules, regulations, or orders of governmental or regulatory authorities to which it is subject, and that it has not failed to obtain any licenses, permits, franchises, or other governmental authorizations necessary for the ownership of its properties or the conduct of its business, to the extent that any such violation, non-compliance or failure, either individually or in the aggregate, materially adversely affects Vendor's consummation of the transactions contemplated by this Agreement, or the performance of Vendor's obligations hereunder.

18.1.11. Financial Condition

As of the Effective Date, Vendor represents, and warrants that it has, a financial condition commensurate with its obligations under this Agreement and sufficient to allow it to readily and successfully fulfill all such obligations, in accordance with this Agreement. Vendor further warrants that, in the event the financial condition of Vendor changes during the Term in such a manner as to jeopardize its ability to , Vendor shall promptly notify the Commonwealth in writing, reasonably describing the nature and extent of such change.

18.1.12. Conflict of Interest

Vendor represents, warrants, and covenants that to its knowledge::

18.1.12.1 No Financial Interest

Neither Vendor nor any of its Affiliates or Subcontractors, , has, shall have, or shall acquire, any contractual, financial, business, or other interest, direct or indirect, that would materially conflict with Vendor's performance of its duties and obligations under this Agreement, or otherwise create an appearance of impropriety with respect to the award or performance of this Agreement; and Vendor shall promptly inform the Commonwealth of any such interest that may be incompatible with the interests of the Commonwealth;

18.1.12.2 No Abuse of Authority for Financial Gain

Neither Vendor nor any of its Affiliates or Subcontractors, , has used or shall use the authority or position provided, or to be provided, under this Agreement to obtain financial gain for Vendor, or any such Affiliate, Subcontractor or employee, or for a member of the immediate family of any such employee , other than the Fees and other benefits that accrue to Vendor, its Affiliates, and Subcontractors hereunder;

18.1.12.3 No Use of Information for Financial Gain

Neither Vendor nor any of its Affiliates or Subcontractors, , has used or shall use any Commonwealth Confidential Information acquired in the award or performance of the Agreement to obtain financial gain for Vendor, or any such Affiliate, Subcontractor or employee, or for a member of the immediate family of any such employee other than the Fees and other benefits that expressly accrue to Vendor, its Affiliates, and Subcontractors hereunder;

18.1.12.4 Other Contracts

Neither Vendor nor any of its Affiliates or Subcontractors, , has accepted or shall accept another Commonwealth contract that would materially impair the ability of Vendor to perform under this Agreement;

18.1.12.5 No Influence

Neither Vendor nor any of its Affiliates or Subcontractors, nor any employee of any of the foregoing, has accepted or shall accept anything of value other than the Fees and other benefits expressly provided hereunder, based on an understanding that the actions of Vendor, or those of any such Affiliate, Subcontractor or employee, on behalf of the Commonwealth would thereby be influenced; and Vendor shall not attempt to influence any Commonwealth employee by the direct or indirect offer of anything of value;

18.1.12.6 No Payment Tied to Award

Neither Vendor nor any of its Affiliates or Subcontractors, nor any employee of any of the foregoing, has paid or agreed to pay any Person, other than bona fide employees and subcontractors working solely for Vendor or any such Affiliate or Subcontractor, any fee, commission, percentage, brokerage fee, gift, or any other consideration, that is contingent upon or would result from the award or execution of this Agreement; and

18.1.12.7 Independent Prices

The prices presented in Vendor's Proposals were arrived at independently, without (for the purpose of restricting competition) consultation, communication, agreement, or otherwise conspiring with any other Person who submitted a proposal; the prices quoted were not knowingly disclosed by Vendor to any other proposer; and no attempt was made by Vendor to induce any other Person to submit or not to submit a proposal for the purpose of restricting competition.

18.1.13. Covenant Against Contingent Fees

Vendor warrants that no Person or selling agency has been employed, engaged, or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by Vendor for the purpose of securing business. Any breach or violation of the foregoing warranty shall constitute an incurable and material breach of this Agreement by Vendor. Further, in such event, the Commonwealth may, in the Commonwealth's sole discretion, deduct from any Fees or other amounts due or payable to Vendor hereunder, or otherwise recover from Vendor, the full amount of such commission, percentage, brokerage, or contingent fee that such Person received from Vendor.

18.1.14. Confidentiality Agreements

Vendor represents that, as of the Effective Date, Vendor has not in any material violation or for in any material respect breached the terms of any confidentiality agreement entered into with the Commonwealth prior to such time.

18.1.15. Efficiency

Vendor represents, warrants and covenants that it shall use commercially reasonable efforts to provide the Services in an efficient and cost-effective manner consistent with the performance and quality of the Services required by this Agreement.

18.2 Warranty Disclaimer

EXCEPT AS EXPRESSLY STATED IN THIS AGREEMENT: THERE ARE NO EXPRESS WARRANTIES MADE BY EITHER PARTY; THERE ARE NO IMPLIED WARRANTIES OR CONDITIONS, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND ANY IMPLIED WARRANTIES OTHERWISE ARISING FROM A COURSE OF DEALING OR USAGE OF TRADE; (iv) ALL SUCH IMPLIED WARRANTIES ARE HEREBY EXPRESSLY DISCLAIMED AND EACH PARTY HEREBY WAIVES AND RELEASES ANY CLAIM TO ANY SUCH IMPLIED WARRANTIES. THERE ARE NO WARRANTIES OF ABSOLUTE SECURITY, ERROR-FREE OPERATION, OR THAT VENDOR WILL IDENTIFY OR CORRECT ALL DEFECTS.

19. INDEMNIFICATION

19.1 By Vendor

As per section 6.3.1 of this proposal, confidentiality has been granted for this section and has thus been omitted from this redact version of IBM's August 5, 2005 detailed proposal submission to the Commonwealth of Virginia.

19.3 Procedures

If any legal action governed by this Section [19](#) is commenced against an Indemnatee, (i) the Indemnatee shall provide Vendor prompt, written, and reasonable notice of such legal action subject to indemnification and all reasonably available information requested in order to enable Vendor to make an informed decision as to whether the indemnity is appropriate,, and (ii) the Indemnatee shall grant Vendor the right to control the defense of the same and the Indemnatee shall provide its reasonable cooperation with Vendor in defense of the claim, including providing all reasonably available information and assistance in defending the claim and using reasonable efforts to obtain extensions of time to respond to such claims. Failure to give prompt notice shall not, however, reduce Vendor's obligations under this Section [19](#), except to the extent it is prejudiced thereby. Nothing herein shall restrict the Indemnatee from participating in the defense of the claim and Vendor's duty to defend Indemnatee shall be in accordance with §2.2-510 and §2.2-514 of the Code of Virginia. No settlement of a claim may be entered into by Vendor on behalf of the Indemnatee which includes obligations to be performed by the Indemnatee without the Indemnatee's prior written approval and in accordance with §2.2-514 of the Code of Virginia.

20. INSURANCE

20.1 General Requirements

Vendor shall purchase and maintain insurance to protect Vendor from claims of the types set forth below that arise out of or result from the performance of the Services, or other performance or operations of Vendor, under or in connection with this Agreement and for which Vendor may be liable, regardless of whether such Services, performance, or operations are provided by Vendor directly or by any of Vendor's agents, consultants, suppliers, or Subcontractors, by anyone directly employed by any of the foregoing, or by anyone else for whose acts or omissions Vendor may be liable.

20.2 Coverages

The insurance required hereunder shall be: (i) maintained by Vendor at all times during the Term and (ii) written for not less than the greater of the limits of coverage specified herein or the limits of coverage required by law in any jurisdiction with authority over Vendor's operations or performance. Such insurance coverage shall be written on an occurrence basis and shall include at least the following:

Worker's Compensation and Employers Liability Insurance affording compensation benefits for all employees in an amount sufficient by virtue of the laws of the state or jurisdiction in which the Services or any portion of the Services are performed and employers' liability insurance with limits of not less than Five Million Dollars (\$5,000,000) for each accident or disease and \$10,000,000 in the aggregate;

Commercial General Liability Insurance with a combined single limit of not less than Five Million Dollars (\$5,000,000) per occurrence and Ten Million Dollars (\$10,000,000) in the aggregate for personal injury, bodily injury (including wrongful death) and

property damage liability, including coverage for all premises and operations, broad form property damage, independent contractors, contractual liability, personal injury and advertising injury, product/completed operations coverage, and a severability of interest clause;

Automobile Liability Insurance with combined single limit of not less than Five Million Dollars (\$5,000,000) per occurrence and \$10,000,000 in the aggregate for injuries, including accidental death and property damage;

Umbrella or Excess Liability Insurance, with limits of not less than Ten Million Dollars (\$10,000,000) per occurrence and \$10,000,000 in the aggregate, that provides additional coverage and combined higher limits for employers' general liability and automobile liability insurance;

Professional Liability Insurance with limits of not less than Ten Million Dollars (\$10,000,000) per claim and \$10,000,000 in the aggregate; and

Employee Dishonesty and Computer Fraud Insurance with limits of not less than Ten Million Dollars (\$10,000,000) per occurrence and \$10,000,000 in the aggregate.

20.3 Specific Requirements

Vendor shall abide by and comply with the following terms for all insurance coverage required by this Section [20](#).

All such insurance shall provide coverage on the basis of occurrences during the policy period, and not on the basis of claims made during the policy period provided however, all Professional Liability coverages are written on a "Claims Made" basis.

Vendor shall provide insurance coverage by insurance companies acceptable to the Commonwealth that have policyholder ratings no lower than "A-" and financial ratings not lower than "VIII" in the latest edition of Best's Insurance Guide in effect as of the Effective Date. Such insurance shall be written with insurers of good standing and licensed to do business in the Commonwealth of Virginia.

Vendor shall verify that all of Vendor's agents, consultants, suppliers, and Subcontractors are sufficiently insured against claims arising out of or relating to their performance related to this Agreement, with coverages complying with those required of Vendor pursuant to, and subject to the other requirements of, this Section [20](#).

The insurance policies described in Section [20.2](#) (b) and (c) shall each name the Commonwealth as an additional insured on a primary basis with respect to liability arising out of with Vendor's performance under this Agreement, except with respect to the negligence or willful misconduct of the Commonwealth..

Each Party hereby waives and shall cause its insurers to waive their rights of subrogation against the other Party, and all of such other Party's subsidiaries, Affiliates, directors, officers, employees, and elected or appointed officials under the insurance policies described in Section [20.2](#) ; except for coverages specified in Section 23.2 (e) and (f) .

The insurance policy requirements set forth in this Section [20](#) shall be subject to the laws of the United States and the Commonwealth of Virginia.

The insurance coverages described in this Section [20](#) shall be primary to and non-contributory with respect to any other insurance or self-insurance that may be maintained by the Commonwealth, and shall contain a cross-liability or severability-of-interest clause, where applicable. The fact that Vendor has obtained the insurance required in this Section [20](#) shall in no manner lessen nor affect Vendor's other obligations or liabilities set forth in this Agreement. Within thirty (30) days after the Effective Date, and from time to time during the Term, at the Commonwealth's reasonable request (but not more frequently than annually), Vendor shall, and shall cause each of its Subcontractors to, supply the Commonwealth with certificates of insurance demonstrating that: (i) all of the insurance required by this Section [20](#) is in force; (ii) not less than thirty (30) days' written notice shall be given to the Commonwealth prior to any cancellation or restrictive modification of any such insurance policies except for Section 23.2 (e) and (f) above;; and (iii) the waivers of subrogation required hereunder are in force except for Section 23.2 (e) and (f) above (except that, if the Commonwealth prefers that Vendor provide a copy of the certificate that adds the Commonwealth as an additional insured to the applicable policy in lieu of any such certificate of insurance, Vendor shall provide a copy such certificate within thirty (30) days after the Commonwealth's request therefor). At the request of the Commonwealth, Vendor shall, and shall cause its Subcontractors to, promptly provide a certified copy of any insurance policy certificate required under this Agreement.

Vendor shall, at Vendor's expense, carry and maintain at all times, and for so long as any item of Vendor's property is in transit, or in the care, custody, or control of the Commonwealth, an insurance policy or policies covering loss, or destruction of, or damage to any such item of Vendor's property in the amount of the full replacement value thereof providing protection against all perils normally covered in an "all risk" physical damage insurance policy. Vendor shall cause its "all risk" physical damage insurers to waive all rights of subrogation against the Commonwealth, and its directors, officers, agents, and employees for any loss, or destruction of, or damage to any item of Vendor's property that is covered by insurance pursuant to this clause 0 of Section [20.3](#).

21. DISPUTE RESOLUTION

21.1 Dispute

21.1.1 Informal Dispute Resolution

If any Disagreement, other than a dispute involving a claim of breach under Section [16](#) hereof, arises between the Parties, Vendor's Relationship Manager and the Commonwealth's Relationship Manager shall, within seven (7) business days after receipt by

either of notice from the other of such disputed matter, commence efforts to resolve such Disagreement in good faith. If the disputed matter has not been resolved by the Relationship Managers within thirty (30) days after first having been referred to the Relationship Managers (or at any earlier time, in the discretion of either Relationship Manager), such dispute may be referred by either Relationship Manager to the Steering Committee for resolution. If a disputed matter is referred to the Steering Committee and such disputed matter has not been resolved by, or at the direction of, the Steering Committee within thirty (30) days after such dispute was first referred to it (or such longer period as agreed to in writing by the Parties), or if a disputed matter shall not have been referred to the Steering Committee within forty-five (45) days after first having been referred to the Relationship Managers for resolution, then the disputed matter shall be escalated to the Chief Information Officer and appropriate business function executives of the Commonwealth and Vendor's Vice President of State and Local Government Services for resolution. If such disputed matter has not been resolved by, or at the direction of, the Chief Information Officer or appropriate business function executive of the Commonwealth and Vendor's Vice President within thirty (30) days after such dispute was first referred to them (or such longer period as agreed to in writing by the Parties), then such disputed matter shall be submitted to an alternative dispute resolution (ADR) forum in accordance with Section [21.1.2](#).

21.1.2 Alternative Dispute Resolution (ADR)

The ADR forum shall consist of mandatory, nonbinding mediation. The mediation is to be conducted in accordance with the Commonwealth's Administrative Dispute Resolution Policy and administrative rules. The request for ADR may be made by either Party. Within ninety (90) days following the Effective Date, the Parties shall mutually agree upon a list of at least three (3) and no more than five (5) individuals that the Parties accept as possible mediators for purposes of this Agreement. In the event a Disagreement is referred to ADR in accordance with this Section [21](#), the Parties may select any individual identified on such list to serve as the mediator or such other individual acceptable to both Parties. Periodically during the Term, the Parties shall update the list of possible mediators as appropriate.

21.1.3 Exceptions

In the event the disputed matter is not resolved by ADR, without regard to whether either Party has contested whether the procedures and duties set forth in Sections [21.1.1](#) or [21.1.2](#) (including the duty of good faith) have been respectively and properly followed or performed, each Party shall have the right to commence any legal action or proceeding as permitted by law. Neither Party shall be obligated to comply with this Section [21](#) with regard to breaches, or alleged breaches, of Section [16](#) hereof, or with regard to any other breach, alleged breach or violation as to which immediate injunctive relief is sought.

21.2 No Termination or Suspension of Services

Notwithstanding anything to the contrary contained elsewhere herein, even if any Disagreement or other dispute arises between the Parties, and regardless of whether or not any such Disagreement or other dispute requires at any time the use of the dispute resolution procedures described above, in no event nor for any reason shall Vendor, at any time during the

Term or during Disentanglement, halt, interrupt, or suspend the provision of Services to the Commonwealth or the performance of any of Vendor's obligations related to Disentanglement, refuse to perform any Services, or perform any other action that prevents, impedes, impairs, reduces, or limits in any way the provision of Services, or the Commonwealth's ability to conduct its business and activities (other than such minimal, routine interruptions as may be necessary and appropriate in order for Vendor to provide the Services), unless: (i) authority to do so is granted by the Commonwealth (or agreed to by the Commonwealth in writing in a Disentanglement Transition Plan) or conferred by a court of competent jurisdiction; (ii) the Term of this Agreement has been terminated or has expired pursuant to Section [11](#) and a Disentanglement has been completed. . (iii) the Commonwealth has not complied with the disputed payment provisions of Section 10.5, or (iv) in the case of a Disentanglement, the Commonwealth has not complied with the payment obligations described below. Notwithstanding a termination of the Term of this Agreement by Vendor for the Commonwealth's Default, and even if a Disagreement exists, Vendor shall provide Disentanglement Services in accordance with this Agreement provided that the Commonwealth has (i) paid all outstanding and invoiced amounts not otherwise validly disputed in good faith by the Commonwealth pursuant to Section [21.1](#), and has complied with the disputed payment provisions of Section 10.5 and, (ii) paid in advance on a monthly basis for such Disentanglement Services. If this Agreement is terminated due to the Commonwealth's failure to comply with its payment obligations herein and the Commonwealth fails to timely comply with such advance payment obligations regarding Disentanglement, Vendor may suspend its performance of Disentanglement Services only if such failure is not cured within ten (10) days after the Commonwealth's receipt of written notice thereof from Vendor.

21.3 Remedies

The procedures described and remedies provided in this Section [21](#) shall not be deemed to limit either Party's rights under Section [11](#) or Section [13](#). Vendor expressly acknowledges that any breach of any provision of Section [21.2](#) by Vendor, the Vendor Personnel, or Vendor's Subcontractors may cause immediate and irreparable injury to the Commonwealth that cannot be adequately compensated for in damages, and that, in the event of any such breach, and in addition to all other remedies available to it, the Commonwealth shall be entitled to seek injunctive or other equitable relief from any court of competent jurisdiction, without bond or other security.

22. USE OF AFFILIATES AND SUBCONTRACTORS

22.1 General

Except as expressly provided in Section [22.5](#): (i) Vendor shall not subcontract all or any part of the Service without the prior written consent of the Commonwealth; (ii) each Subcontractor may perform only the specific Services described with regard to such Subcontractor in a written request submitted by Vendor to the Commonwealth when seeking such consent; (iii) no material change may be made to the specific Services performed by a particular Subcontractor, and no substitution, replacement, or change of Subcontractors may be made, without the advance written consent of the Commonwealth; and All performance of

Services by each Subcontractor shall at all times be in accordance with the terms and conditions of this Agreement. Prior to performing any Services, each Subcontractor shall execute a Confidentiality Agreement in accordance with Section [16.6](#) hereof. Vendor covenants that its arrangements with Subcontractors shall not prohibit or restrict any such Subcontractor from, at any time, entering into direct agreements with the Commonwealth. Notwithstanding anything to the contrary set forth in this Section [22](#) or elsewhere in this Agreement, Vendor shall not engage any Subcontractors that are or now or hereafter debarred or suspended from performing services for the Commonwealth of Virginia or the United States government.

22.2 Approval and Removal

The Commonwealth's consent with respect to Vendor's use of a particular proposed Subcontractor, shall be given or withheld in writing within Vendor's reasonably requested timeframe, and, if such consent is withheld, the Commonwealth's notice thereof to Vendor shall set forth the reasons for such withholding of consent. If the Commonwealth determines in good faith and in a commercially reasonable manner that the performance or conduct of any Subcontractor is unsatisfactory, the Commonwealth may notify Vendor of its determination in writing, indicating the reasons therefor, in which event Vendor shall promptly take all necessary actions to remedy the performance or conduct of such Subcontractor or to replace such Subcontractor by another third party or by Vendor personnel.

22.3 Responsibility and Liability

Vendor shall be solely and exclusively responsible for supervising the activities and performance of each Subcontractor. Notwithstanding the fact that a Subcontractor or Affiliate of Vendor may be the party actually performing a particular Service or providing a particular Deliverable hereunder, Vendor shall at all times: (i) constitute the primary obligor for all of Vendor's duties and obligations hereunder; and (ii) be liable and responsible as a principal for the performance of all of the duties and obligations of Vendor hereunder that Vendor may elect to subcontract to any of its Subcontractors or Affiliates, or to any other third party. The Commonwealth shall be solely and exclusively responsible for the acts and omissions of all End Users related to this Agreement and shall be the primary obligor related to any Services received by End Users.

22.4 Approved Subcontractors

The Commonwealth's consent, as described in Section [22.1](#), shall hereby be deemed to be given with respect to the Subcontractors, and their respective associated duties, identified in Schedule [22.4](#) attached hereto. Vendor has covenants that each such Subcontractor is a competent, qualified, experienced provider of the particular types of Services identified with respect to such Subcontractor in Schedule [22.4](#), and that each such Subcontractor is fully capable of, fulfilling and satisfying the Commonwealth's requirements described in this Agreement for such Services. Vendor shall use commercially reasonable efforts to ensure that each Subcontractor identified as a Key Subcontractor in Schedule [22.4](#) is retained and continues to perform the duties, or provide the particular types of Services, that are identified with respect to such Key Subcontractor in Schedule [22.4](#), throughout the duration of the Term, unless Vendor

has obtained the Commonwealth's prior written consent for the replacement or dismissal of such Key Subcontractor.

22.5 Exceptions

Notwithstanding Section [22.1](#) or anything else to the contrary elsewhere in this Agreement, Vendor may subcontract, without the Commonwealth's advance written consent: (i) for goods and services that are incidental to the performance of the Services and do not involve the anticipated expenditure under this Agreement of more than Two Hundred Fifty Thousand Dollars (\$250,000.00) within any one (1) year period; provided that subcontract does not involve direct contact with employees of the Commonwealth or performance of work at Commonwealth facilities; and (ii) for additional goods or services with Subcontractors specifically identified in Schedule [22.4](#) attached hereto, as modified from time to time by mutual written agreement of the Parties. Upon the Commonwealth's written request, Vendor shall provide the Commonwealth with reasonably detailed information regarding any such subcontracting or other acquisition of goods and services by Vendor pursuant to this Section [22.5](#).

22.6 Subcontractor Agreements

Within thirty (30) days after such agreement is executed, Vendor shall provide the Commonwealth with a true and complete written summary (excluding relevant pricing information) of any agreement between Vendor and its Subcontractors that relates to performance under this Agreement and with regard to which the cumulative or total value is, or is reasonably expected to be, in excess of Two Hundred Fifty Thousand Dollars (\$250,000.00). Vendor covenants that each such agreement or subcontract shall appropriately reflect and conform with all applicable and material terms and conditions of this Agreement.

22.7 Use of SWAMs in Subcontracting

22.7.1 The Commonwealth's Policy

The Commonwealth is committed to equal opportunity to compete for contracting and subcontracting business and it is the policy of the Commonwealth, as part of this commitment, that small business enterprises, women-owned small business enterprises, and minority-owned business enterprises (all of the foregoing, collectively, "SWAMs") shall have an equal opportunity to compete fairly to receive business as subcontractors of the various different contractors and suppliers of the Commonwealth. Vendor shall at all time use its good faith efforts to carry out this policy in the award of subcontracts to the fullest extent that is consistent with efficient contract performance. Vendor shall establish and conduct a program that ensures that SWAMs are considered fairly as subcontractors and suppliers by Vendor in carrying out Vendor's obligations under this Agreement.

22.7.2 Reporting SWAM Performance to the Commonwealth

Within fifteen (15) days after the end of each Contract Quarter, Vendor shall report to the Commonwealth the following information: (i) the names, addresses, and phone numbers of all SWAMS that are or have participated in performance of the Vendor's obligations under the Agreement, along with documentation of SWAM certification by the Virginia Department of Minority Business Enterprise (DMBE); (ii) a description of the Services or other work that each SWAM has performed; and (iii) the total dollar amount paid by the Vendor to each SWAM. Such reports of Vendor shall be delivered to the Commonwealth in the form described in Schedule [14.1](#).

23. PUBLICITY

Neither Party shall issue or publish a press release, article, brochure, or other form of publication, promotional materials, or advertisement that includes statements about this Agreement, the other Party and its agencies, or in any way use any logo, trademark, or other symbol of the Commonwealth and its agencies, without obtaining in advance the other Party's express written consent to the form and substance of such issuance, publication, advertisement, or use. Notwithstanding the foregoing, Vendor may identify the Commonwealth as a reference for all prospective customers of Vendor interested in obtaining services that are the same or substantially similar to the Services hereunder, unless directed not to do so by the Commonwealth.

24. MISCELLANEOUS

24.1 Entire Agreement

This Agreement, including all Schedules, Exhibits, and other attachments hereto (the terms of each of which are incorporated herein by this reference), constitutes the entire understanding and agreement between the Parties with respect to the transactions contemplated herein and supersedes all other prior or contemporaneous oral or written communications, understandings or discussions with respect to the subject matter of this Agreement. No usage of trade, or other regular practice or method of dealing between the Parties or others, may be used to modify, interpret, supplement, or alter in any manner the express terms of this Agreement.

24.2 Captions; Section Numbers; Terminology

Captions, Tables of Contents, Indices of Definitions, and Section, Schedule, and Exhibit titles and headings are used herein for convenience of reference only and shall not be used in the construction or interpretation of this Agreement. Except as otherwise specifically identified in this Agreement, any reference herein to a particular Section, or a particular Schedule or Exhibit (e.g., Schedule [2.2](#) (Statements of Work)), shall be deemed a reference to the Section, or the Schedule or Exhibit, or this Agreement that bears the specified number. Further, any reference herein to a particular Section number (e.g., "Section 2"), shall be deemed a reference not only to the referenced Section but also to all subsections thereof (e.g., a reference to "Section 2" refers to Sections 2.1, 2.1.1, 2.2, 2.2.1, 2.2.1.1, etc.).

24.3 Assignment

Except for subcontracting permitted under the terms of Section [22](#), neither this Agreement, nor any interest herein, nor any of the rights and obligations of a Party hereunder, may be directly or indirectly assigned, sold, delegated, or otherwise disposed of by that Party, in whole or in part, without the prior written consent of the other Party. For purposes hereof, an “assignment” subject to the terms and conditions of this Section [24.3](#) shall be deemed to have occurred in the event of any change in control of Vendor as defined in Section 14.3 (whether resulting from a single transaction or series of related transactions); provided that for such change in control, the Commonwealth’s sole remedy shall be to terminate this Agreement as provided in Section 14.3. Any assignment made in violation of this Section [24.3](#) shall be null and void and of no force and effect.

24.4 Notices to a Party

Except as expressly otherwise stated herein, all notices, requests, consents, approvals, or other communications provided for, or given under, this Agreement, shall be in writing, and shall be deemed to have been duly given to a Party if delivered personally, or transmitted by facsimile to such Party at its telecopier number set forth below (with the original sent by recognized overnight courier or first class mail to the Party at its address set forth below), or sent by first class mail or overnight courier to such Party at its address set forth below, or at such other telecopier number or address, as the case may be, as shall have been communicated in writing by such Party to the other Party in accordance with this Section. All notices shall be deemed given when received, in the case of personal delivery or delivery by mail or overnight courier, or when sent, in the case of transmission by facsimile with a confirmation, if confirmed by copy sent by overnight courier within one (1) day after sending the facsimile.

Notices to the Commonwealth shall be addressed as follows:

[_____]

Fax:

With a copy on all legal notices, including lawsuits, third party actions and subpoenas to:

Office of the Attorney General
900 E. Main Street
Richmond, Virginia
Attention: John Westrick, Assistant Attorney General

Notices to Vendor shall be addressed as follows:

[_____]

Fax:

With a copy to:

24.5 Amendments

Except as expressly provided herein, this Agreement may not be modified or amended except by written document duly executed by authorized representatives of both of the Parties hereto. No other act, document, usage or custom shall be deemed to amend or modify this Agreement. If either Party desires to amend this Agreement, the requesting Party shall deliver to the other Party's Relationship Manager a written request for an amendment (an "Amendment Request"), specifying the requested amendment with sufficient details to enable the other Party to reasonably evaluate it. Within ten (10) business days after the date of receipt of such Amendment Request, the receiving Party shall provide the requesting Party with a written response as to whether the requesting Party's proposed amendment is acceptable. If, in such response, the receiving Party indicates that the requesting Party's proposed amendment is acceptable, the Parties shall promptly and duly execute a written document evidencing such amendment and this Agreement shall be amended in accordance with the terms of such written document.

24.6 Waiver

No term or provision of this Agreement shall be deemed waived and no breach excused, unless such waiver or excusal is in writing and signed by the Party claimed to have waived or excused. The failure or delay of either Party to exercise any right, power, or privilege hereunder shall not constitute a waiver thereof. A waiver shall be effective only in the specific instance, and for the specific purpose, stated in such writing, and shall not preclude further exercise of the same right, power, or privilege or the exercise of any other right, power, or privilege hereunder. No agreement by either Party to indemnify the other hereunder, nor any exceptions to any such agreement, shall constitute, or be construed as, a waiver of any rights of contribution otherwise available at law or in equity to either Party, subject to the limitation of liability provisions contained herein.

24.7 Relationship Between and Legal Status of Parties

This Agreement shall in no event be construed in such a way that either Party constitutes, or is deemed to be, the representative, agent, employee, partner, or joint venturer of the other Party. Vendor is and shall at all times be an independent contractor with regard to all

performance under this Agreement. Neither Party shall have the authority to enter into any agreement, nor to assume any liability, on behalf of the other Party, nor to bind or commit the other Party in any manner, except as expressly provided herein. Vendor's and its Subcontractors' employees who provide Services pursuant to this Agreement, or who at any time are located or provide Services on the Commonwealth's premises, shall remain the respective employees of Vendor or its Subcontractors, as applicable, and Vendor and its Subcontractors shall have sole responsibility for all such employees, including responsibility for payment of all compensation to them and, the provision of employee benefits to them, in the course of their employment. Vendor and its Subcontractors shall be responsible for all aspects of labor relations with such employees, including their hiring, supervision, evaluation, discipline, firing, wages, benefits, overtime, and job and shift assignments, and all other terms and conditions of their employment, and the Commonwealth shall have no responsibility whatsoever for any of the foregoing.

24.8 Non-Exclusive Remedies

Unless expressly provided otherwise in this Agreement, no remedy set forth in this Agreement shall be exclusive of any other remedy and each such remedy shall be in addition to and not in lieu of every other remedy given hereunder, or now or hereafter existing or available at law, in equity, by statute, or otherwise.

24.9 Severability

If any provision of this Agreement is determined by any court or tribunal of competent jurisdiction to be invalid or unenforceable, that provision shall be deemed severed and stricken from this Agreement and: (i) the remainder of this Agreement shall continue in full force and effect insofar as it remains a workable instrument to accomplish the intent and purposes of the Parties, as evidenced herein; and (ii) the severed provision shall be deemed replaced by the valid, legal, and enforceable provision that comes closest to reflecting the intention of the Parties underlying the severed provision.

24.10 Counterparts

This Agreement may be executed in duplicate counterparts. Each such counterpart, if executed by both Parties, shall be an original and both such counterparts together shall constitute but one and the same document. This Agreement shall not be deemed executed unless and until at least one counterpart bears the signature of each Party's designated signatory.

24.11 Governing Law; Venue

The construction, formation, and interpretation of this Agreement, and the performance of the Parties hereunder, shall be governed and construed in accordance with the laws of the Commonwealth of Virginia, without regard to conflicts of laws provisions thereof. The exclusive venue for all actions or proceedings arising out of, or related to, this Agreement shall be in an appropriate court located in Richmond, Virginia, and Vendor hereby irrevocably consents to the personal and subject matter jurisdiction of such court and waives any claim that such courts do not constitute a convenient and appropriate venue for such actions or proceedings.

Vendor consents to service of process upon itself by means of any of the methods that are specified under applicable law. The Parties specifically exclude from application to this Agreement the United Nations Convention on Contracts for the International Sale of Goods. The Parties irrevocably waive any right to a jury trial in any proceeding relating to this Agreement.

24.12 Governmental Immunity

Notwithstanding anything to the contrary set forth elsewhere in this Agreement, the Commonwealth has not, and in no event shall be construed to have, waived any rights or defenses of governmental immunity that it may have with respect to any matters arising out of this Agreement or performance hereunder.

24.13 No Third-Party Beneficiaries

This Agreement is an agreement by and between the Parties, and neither: (i) confers any rights upon any of the employees, agents, or contractors of either Party, or upon any other Person not a Party hereto; or (ii) precludes any actions or claims against, or rights of recovery from, any Person not a Party hereto.

24.14 Expenses

Each Party shall be solely responsible for all expenses paid or incurred by it in connection with the planning, preparation, negotiation, and consummation of this Agreement.

24.15 Order of Precedence

In the event of conflict in substance or impact between the terms and conditions of Sections [1](#) through [25](#) of this Agreement and those of any Schedule, Exhibit, or other attachment hereto, the terms and conditions of such Schedule or Exhibit Sections shall control, subject to the right of Vendor and the Commonwealth to mutually amend the Agreement and the Schedules, Exhibits, and other attachments, as set forth herein.

24.16 Further Assurances

Each Party agrees to execute and deliver any and all additional documents and instruments, and take all other actions that may be necessary to give effect to this Agreement and all transactions and activities contemplated hereby ; provided that neither Party shall be required to enter into any other contracts with each other or with third parties, unless expressly provided.

24.17 Neither Party Considered Drafter

Despite the possibility that one Party may have prepared the initial draft of this Agreement or played the greater role in the physical preparation of subsequent drafts, the Parties agree that neither Party shall be deemed the drafter of this Agreement and that in construing this Agreement, in the event of any claim that any provision hereof may be ambiguous, no provision hereof shall be construed in favor of one Party on the ground that such provision was drafted by

the other. In all respects, this Agreement shall be construed as though jointly prepared by the Parties.

25. DEFINITIONS

The following words and phrases, when used in this Agreement, shall have the indicated meanings. (Terms capitalized within a particular definition are defined elsewhere within this Agreement.)

25.1 Acceptance Criteria

“Acceptance Criteria” means the applicable acceptance criteria if any for the software Deliverable being tested as set forth or referenced in the applicable Statement of Work.

25.2 Acceptance Test Procedures

“Acceptance Test Procedures” means, collectively, the acceptance test procedures, if any for the software Deliverable being tested set forth or referenced in the applicable Statement of Work, or such other procedures and standards mutually agreed upon by the Parties in writing.

25.3 Affiliate

“Affiliate” means, as to entity, any Person that, directly or indirectly, controls, is controlled by, or is under common control with, such entity, whether through ownership of voting securities or otherwise. For this purpose, and without limiting the foregoing, any Person that owns more than fifty percent (50%) of the outstanding voting securities of any other Person shall be deemed to control such other Person.

25.4 Agreement

“Agreement” means this Comprehensive Master Services Agreement between the Commonwealth and Vendor, as amended in writing from time to time, including these terms and conditions, and all Statements of Work, Exhibits, Schedules, and other attachments hereto.

25.5 Analysis Services

“Analysis Services” has the meaning given it in Section [2.1.1](#).

25.6 Auditors

“Auditors” means, with respect to a Party, the independent third-party auditors designated by such Party in writing from time to time, in its sole discretion. With respect to the Commonwealth, such term shall include the Commonwealth Auditor of Public Accounts, the staff of the Joint Legislative Review and Audit Commission (JLARC), the Commonwealth Department of Accounts, and the Director of the Commonwealth Internal Audit Services.

25.7 The Commonwealth

“The Commonwealth” means the Commonwealth of Virginia.

25.8 Commonwealth Data

“Commonwealth Data” means, in or on any media or form of any kind: (i) data, or summaries or indices of data, related to or describing the Commonwealth, or the residents, constituents, citizens, clients, customers, employees, agents, subcontractors (other than Vendor or Vendor Subcontractors), or other representatives of the same, or related to or describing the Services, regardless of whether or not such data, summaries or indices are owned by the Commonwealth, generated or compiled by the Commonwealth, or provided by such residents, constituents, citizens, clients, customers, employees, agents, subcontractors, or representatives, including data that are in the Commonwealth’s databases or otherwise in their possession or control on the Effective Date or at any time thereafter; (ii) other Commonwealth records, data, files, input materials, processed data, results of data analyses, information, reports, forms, and other such items and materials that may be created, received, computed, developed, used, or stored by Vendor, or by any of Vendor’s Subcontractors, for or on behalf of the Commonwealth in, or in connection with, the performance of Vendor’s duties under this Agreement, but excluding in any event any internal data and information of Vendor and its Subcontractors (other than service level measurements and contract charges) and any correspondence between the Parties; and (iii) modifications, compilations, and derivative works of the items, data, and other materials described by the foregoing clauses (i) and (ii) as being included within Commonwealth Data. . Notwithstanding the foregoing, Commonwealth Data shall not include (a) any data, information, or intellectual property of Vendor or Vendor Subcontractors, (b) any derivatives of such information, data, or intellectual property, or (c) any Underlying Works.

25.9 Commonwealth Software

“Commonwealth Software” means Software that is owned by the Commonwealth, and all supporting documentation, media, and related materials, and all modifications, enhancements, updates, replacements, and other derivative works of any of the foregoing. Commonwealth Software specifically excludes the Vendor Software and the Third-Party Software.

25.10 Commonwealth Works

“Commonwealth Works” means tangible and intangible information and developments that are owned by the Commonwealth (including Commonwealth Software, to the fullest extent of the Commonwealth’s rights therein), including all intermediate and/or partial versions thereof and all designs, specifications, inventions, discoveries, improvements, materials, program materials, software, flow charts, notes, outlines, lists, compilations, manuscripts, writings, pictorial materials, schematics, other creations, and the like, in any form or media.

25.11 Commonwealth Confidential Information

“Confidential Information of a Party ” means:

technical information, materials, data, reports, programs, documentation, diagrams, ideas, concepts, techniques, processes, inventions, knowledge, know-how, and trade secrets, whether in tangible or intangible form, whether disclosed or conveyed by visits to the a Party's sites or facilities, whether or not marked or otherwise identified as confidential, and whether in any specific form or media, or disclosed orally, that are developed or acquired by such Party (other than from the other Party or its agents or subcontractors),

information and data relating to a Party's practices, personnel, customers (and the business practices, habits, needs, trends, and ordering history of such customers), products, services, orders, business, management information services, financials, costs, or margins that is not generally known by others in the same line of business;

information that a Party identifies to the other Party as confidential by a stamp or other similar notice;

information and data relating to the other Party's performance assessments or appraisals, severance packages, and other benefits, of or applicable to such employees or former employees of the Party's;

other information relating to a Party that is treated as confidential by Party's and that a reasonably prudent person would expect not to be made available to third parties without restriction or payment; and

(i) Work Product, Commonwealth Data, subject to 12.3.2 with respect to Developed Commonwealth Software), Vendor Works, Vendor Software, Underlying Works, Developed Vendor Software; Commonwealth Software; and (ii) records, data, information or materials in the possession or control of a Party, or, in any form or media, in connection with this Agreement (including individually identifiable health information), that the Party is, for any reason, prohibited by law from publicly disclosing.

Confidential Information shall not include specific information that a Party can demonstrate was: (i) at the time of disclosure to that Party, available to the public, as evidenced by generally available documents or publications, through no fault of that Party; (ii) after disclosure to a Party published or otherwise made a part of the public domain through no fault of that Party; (iii) already in the possession of a Party, without that Party being under any obligations of confidentiality with respect thereto, at the time of disclosure by the other Party; (iv) received or obtained by a Party, without the Party assuming any obligations of confidentiality with respect thereto, from a third party who had a lawful right to disclose such Confidential Information to the Party; (v) independently developed by a Party without reference to the other Party's Confidential Information; or (vi) required to be disclosed or made publicly available by applicable law, statute, regulation, or ordinance, including this Agreement or any portion thereof that the Commonwealth is required to disclose under applicable law, statute, regulation, or ordinance provided that with respect to the foregoing disclosures, Commonwealth shall disclose only the minimum amount of information necessary and obtain all confidentiality treatment available under the law., including specifically the Virginia Freedom of Information Act. For purposes hereof, specific information (e.g., that disclosed in connection with

engineering and design practices, and related techniques, equipment, products, or operating conditions), shall not be deemed to be within the foregoing exceptions merely because it represents a specific instance or example of general information or disclosures in the public domain or in the possession of a Party. In addition, no combination of features shall be deemed to be within the foregoing exceptions merely because individual features contained therein are in the public domain or in the possession of a Party, and such a combination of features shall be deemed to be within the foregoing exceptions only if both the combination itself and its principle of operation are in the public domain or in the possession of a Party. For purposes of this provision, information is in the public domain if it is generally known (through no fault of a Party) to third parties who are not subject to nondisclosure restrictions similar to those in this Agreement.

25.12 Confidentiality Agreement

“Confidentiality Agreement” has the meaning given it in Section [16.6](#).

25.13 Consent

“Consent” whether capitalized or not and unless expressly specified otherwise, means, with regard to either a specified or an applicable Party whose consent is required hereunder, the voluntary, freely-given consent of such Party. Unless otherwise expressly specified, all Consents and approvals required to be obtained from a Party under this Agreement may not be unreasonably withheld..

25.14 Contract Quarter

“Contract Quarter” means each successive three month period beginning on the Signing Date.

25.15 Contract Year

“Contract Year” means any one-year period ending at the end of the day before an anniversary of the Effective Date.

25.16 CPI Increase

“CPI Increase” means the percentage change between (i) the Consumer Price Index, All Urban Consumers, U.S. City Average, all items, most recently published (at the time of calculation) by the Bureau of Labor Statistics of the United States Department of Labor (or a successor agency of the United States government) and (ii) the comparable statistic published for the same month of the previous year. In the event the specified CPI statistic is not reasonably available for both the then current and previous year, the “CPI Increase” shall be a reasonable measure of change in consumer prices reasonably determined by the Commonwealth.

25.17 Credit Rating

25.18 Critical Milestones

“Critical Milestones” means actions and projects identified as Critical Milestones in a Statement of Work.

25.19 Day

“Day” whether capitalized or not and unless expressly specified otherwise, means a calendar day.

25.20 Default

“Default” means the occurrence of any one or more of the following:

[13.3](#);

;

any material breach of this Agreement by Vendor, provided that such breach, is not cured within thirty (30) days after the Commonwealth provides Vendor with written notice thereof;

numerous or repeated breaches or defaults by Vendor of its obligations under this Agreement which collectively constitute a material breach of this Agreement, provided that such breach is not cured within thirty (30) days after the Commonwealth provides Vendor with written notice thereof

the insolvency of Vendor, a general failure of Vendor to pay its debts in the normal course, the entrance of Vendor into receivership or any arrangement or composition with creditors generally, the filing of a voluntary petition (or an involuntary petition that is not dismissed within sixty (60) days) for bankruptcy or reorganization or dissolution or winding-up of Vendor, a general assignment for the benefit of creditors of Vendor, or a seizure or a sale of a material and substantial part of Vendor’s property by or for the benefit of any creditor or governmental agency;

For purposes of this Section [25.20](#), the word “cure” shall include implementation by the applicable Party of a reasonable work-around or similar temporary measures, provided that such measures do not cause the other Party to incur significant expense, or expend significant time or resources, and that the defaulting Party continually pursues and promptly implements a full and complete cure until such time as such cure is so effected.

25.21 Deliverable

“Deliverable” means a material newly created pursuant to the terms of this Agreement that must be provided by Vendor to the Commonwealth under the terms of this Agreement. .

25.22 Disabling Device

“Disabling Device” has the meaning given it in Section [2.6](#).

25.23 Disagreement

“Disagreement” means a dispute, controversy, or claim of any nature arising under or in connection with this Agreement, including any that results from any of the following:

- (a) an alleged failure by either Party to perform its obligations under this Agreement;
- (b) an alleged inadequacy or delay of either Party’s performance under this Agreement;
- (c) a request for products, services, or resources where the Parties disagree whether such products, services, or resources are within the scope of this Agreement;
- (d) a disagreement as to the responsibilities either Party has under this Agreement; or
- (e) a disagreement as to the creation, validity, interpretation, breach, or termination of this Agreement.

25.24 Disagreement Report

“Disagreement Report” means a written report executed by both Parties describing a solution to a Disagreement.

25.25 Disentanglement

“Disentanglement” has the meaning given it in Section [12.1](#).

25.26 Disentanglement Commencement Date

“Disentanglement Commencement Date” has the meaning given it in Section [12.3](#).

25.27 Disentanglement Transition Plan

“Disentanglement Transition Plan” has the meaning given it in Section [12.1](#).

25.28 Documentation

“Documentation” means, with respect to any particular Items: (i) all of the written, printed, electronic, or otherwise formatted materials that relate to such Items, or any component thereof; (ii) all user, operator, system administration, technical, training, support, and other manuals and all other written, printed, electronic, or other format materials that represent, demonstrate, explain or describe the functional, operational or performance capabilities of such Items; and (iii) all specifications, materials, flow charts, notes, outlines, manuscripts, writings, pictorial or graphical materials, schematics, and other documents that represent, demonstrate, explain or describe such Items. Documentation excludes Software source code unless otherwise expressly specified.

25.29 Effective Date

“Effective Date” has the meaning given it in Section [1.4](#).

25.30 Environmental Laws

“Environmental Laws” means applicable federal, state, or local statutes, laws, regulations, rules, ordinances, codes, licenses, orders, or permits of any governmental entity relating to environmental matters including: (i) the Clean Air Act (42 U.S.C. §§ 7401 et seq.), the Federal Water Pollution Control Act (33 U.S.C. §§ 1251 et seq.), the Safe Drinking Water Act (42 U.S.C. §§ 300f et seq.), the Toxic Substances Control Act (15 U.S.C. §§ 2601 et seq.), the Endangered Species Act (16 U.S.C. §§ 1531 et seq.), the Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. §§ 110011 et seq.); and (ii) all state and local provisions similar in substance or intent to the federal laws described in the foregoing clause (i).

25.31 Exit Fee

“Exit Fee” means the early termination fee, if any, specified in a Statement of Work.

25.32 Expiration Date

“Expiration Date” has the meaning given it in Section [11.1.1](#).

25.33 Fees

“Fees” means the fees payable by the Commonwealth to Vendor hereunder in consideration of Vendor’s performance of the Services, as described in Section 0 and specified in, and calculated pursuant to, the applicable Statement of Work.

25.34 Fee Schedule

“Fee Schedule” means Schedule [8.1](#).

25.35 Force Majeure Event

“Force Majeure Event” means a cause beyond the reasonable control of a Party that prevents or delays such Party’s performance hereunder (or that affects such Party’s need for, ability to effectively utilize, or ability to provide, Services hereunder), including acts of God, act of governmental body or military authority, fire, explosion, power failure, flood, epidemic, riot or civil disturbance, war, sabotage, accidents, civil insurrections, blockades, embargoes, storms, labor disputes (except those involving personnel of Vendor, its Affiliates or its Subcontractors), earthquakes, elements of nature, terrorism, rebellions or revolutions in the United States, or other similar events, .

25.36 Functional Areas

“Functional Areas” means each of the IT- or business-process areas of the Commonwealth’s operations defined in the initial Statement of Work for Analysis Services attached hereto as Appendix 1 to Schedule [2.2](#), and such additional areas that the Commonwealth may identify in writing from time to time . Subject to the Change Management Procedure, for which Vendor will provide Services pursuant to a Statement of Work.

25.37 Go Live Date

“Go Live Date” has the meaning given it in Section [5.3.2](#).

25.38 Government Approvals

“Government Approvals” means permits, waivers, approvals or consents that are required to be obtained from a governmental entity (other than the Commonwealth or End User), under applicable laws and regulations, in connection with the consummation of a particular agreement, event or transaction.

25.39 Hazardous Material

“Hazardous Material” means a substance, the presence of which requires investigation or remediation under an Environmental Law, or that is or becomes defined as a “hazardous waste,” “hazardous substance,” pollutant, or contaminant under an Environmental Law.

25.40 IT

IT” means information technology.

25.41 Implementation Services

“Implementation Services” has the meaning given it in Section [2.1.1](#).

25.42 Including

“Including,” whether capitalized or not, means “including, but not limited to.”

25.43 Indemnitees or Commonwealth Indemnitees

“Indemnitees” or “Commonwealth Indemnitees” means, with respect to the Commonwealth.

25.44 Infringement Claim

“Infringement Claim” has the meaning given it in Section [19.1.1](#).

25.45 Intellectual Property Rights

“Intellectual Property Rights” means intellectual property rights, and moral rights or similar or analogous proprietary rights, pertaining to a particular invention, work of authorship, symbol or other mark or designation indicative of source or quality, arising under statutory or common law or by contract, in the United States or another country that recognizes such rights, whether or not perfected, now existing or hereafter filed, issued, or acquired, including: (i) patent rights associated with an invention and processes (including business processes), methods and apparatuses entailed by such invention (including, as applicable, the rights to make, use, sell, offer to sell, import into the United States, or have made, and the rights to file and prosecute patent applications and provisional patent applications); (ii) rights associated with works of authorship, including copyrights and mask work rights (including the rights to copy, adapt, distribute, display, perform, and create derivative works); (iii) rights relating to the protection of trade secrets and confidential information (including the rights to use and disclose); (iv) trademarks, service marks, trade dress, trade names, and design patent rights (including the right to goodwill appertaining thereto); (v) moral rights; and (vi) other rights analogous, similar, or comparable to those described by the foregoing clauses (i) through (v), and other intellectual proprietary rights relating to intangible property (including licensing rights and shop rights).

25.46 Interest

“Interest” means interest accruing at the daily equivalent of an annual rate equal to the lesser of: (i) [] percent ([]%); and (ii) the maximum amount permissible by the applicable law.

25.47 Item

“Item” means any Service, System, Deliverable, Work Product, Underlying Work, or Residual.

25.48 Key Personnel

“Key Personnel” means those Vendor Personnel who are identified in Schedule [6.1](#) attached hereto, or the holders of the positions that are identified in such Schedule..

25.49 Key Subcontractor

“Key Subcontractor” means any Subcontractor identified in Schedule [22.4](#) attached hereto as a Key Subcontractor. 25.50 Live Testing

“Live Testing” has the meaning given it in Section [5.3.2](#).

25.51 Losses

“Losses” means: (i) amounts actually paid to third parties for judgments, settlements, awards, liabilities, losses, damages, and civil penalties) (all the foregoing to the extent paid to such third party pursuant to a settlement approved by the indemnifying party or a judgment with respect to such claim); and; (ii) reasonable attorneys’ fees incurred by the applicable Indemnitees, in the case of litigation or arbitration prior to the indemnifying party assuming control of the defense.25.52 Party

“Party” means the Commonwealth or Vendor; “Parties” means both the Commonwealth and Vendor.

Pass-Through Software

Pass-Through Software is software owned or supplied by a third party (including Vendor Subcontractors) that has been identified by the Parties as necessary to the performance of Services and that is licensed by that third party pursuant to a separate license agreement between the third party and the Commonwealth. Unless otherwise specified in this Agreement, Pass-Through Software shall be included as part of the Fees payable to Vendor and Vendor shall be responsible for the payment of applicable license and maintenance charges to the Pass-Through Software Owner. For the avoidance of doubt, Pass-Through Software shall in no event be considered Third Party Software, Third Party Works, or Underlying Works.

25.53 Person

“Person” means any natural person, corporation, limited liability company, limited liability partnership, general partnership, limited partnership, trustee of a trust or estate, association, governmental body or organization or agency, or other legal person or legally constituted entity of any kind.

25.54 Performance Credit

“Performance Credit” means a monetary credit to which the Commonwealth is entitled, as specified in this Agreement, as a result of a particular failure or deficiency in Vendor’s performance, including, for example: (i) Services being performed at levels that do not meet or exceed the applicable Service Levels; and (ii) Critical Milestones not being met or achieved by their respective required dates.

25.55 Post-live Acceptance

“Post-live Acceptance” has the meaning given it in Section [5.3.2](#).

25.56 Pre-live Acceptance

“Pre-live Acceptance” has the meaning given it in Section [5.3.1](#).

25.57 Pre-live Testing Period

“Pre-live Testing Period” has the meaning given it in Section [5.3.1](#).

25.58 Procedures Manual

“Procedures Manual” means the written document setting forth the operational policies, practices and procedures to be followed by the parties in connection with performance of the Services, as further described in Section [1.2](#).

25.59 Proposals

“Proposals” has the meaning given it in Section [1.2](#).

25.60 Relationship Manager

“Relationship Manager” means, with respect to a Party, the individual who is designated its Relationship Manager in Schedule [6.1](#) hereto, and any subsequent holder of that position designated by such Party and, to the extent required by the terms and conditions of Section [6.1](#), approved by the other Party.

25.61 Residuals

“Residuals” means a Party’s knowledge, skills, and experience, and ideas, concepts, know-how, and techniques, whether developed by it before or during the Term or otherwise obtained by it in connection with performing or receiving the Services, that are related to such Party’s business or business and that are retained in the unaided memories of such Party’s personnel in connection with the performance or receipt of the Services, except that Residuals shall in no event include any: (i) information intentionally memorized for the purpose of permitting its subsequent use or disclosure; (ii) license to patents or copyrights, or (ii) symbol or other mark of the other Party or its Affiliates (or in the case of the Commonwealth) that is indicative of source or quality; .

25.62 Security Policies

“Security Policies” has the meaning given it in Section [10.1](#).

25.63 Service Levels

“Service Level” means the level of service or performance for a particular task, activity, or Service performed by Vendor hereunder, as specified in the applicable Statement of Work.

25.64 Services

“Services” has the meaning given it in Section [2.1](#).

25.65 Signing Date

“Signing Date” has the meaning given it in Section [1.4](#).

25.66 Software

“Software” means computer programs and program objects of any kind (including object code and source code, and any intermediate forms or versions thereof), program set-up and customization parameters and data, and the tangible media on which any of the foregoing are recorded. No licenses to source code are granted hereunder, unless expressly specifically provided for in an applicable Software license grant hereunder.

25.67 Software Component

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25.68 Specifications

“Specifications” means the descriptions of Items provided hereunder, and the respective components, capacities, functions, and methods of such Items, to the extent, set forth in this Agreement, or as otherwise provided to the Commonwealth by Vendor in writing.

25.69 Statement of Work

“Statement of Work” has the meaning given it in Section [2.2](#).

25.70 Status Report

“Status Report” has the meaning given it in Section [4.1](#).

25.71 Steering Committee

“Steering Committee” has the meaning given it in Schedule [4.3](#).

25.72 Subcontractor

“Subcontractor” means any Person (including any Vendor Affiliate) other than Vendor that provides Services, , to the Commonwealth in connection with this Agreement pursuant to an agreement such Person has with Vendor.

25.73 Suspension

“Suspension” has the meaning given it in Section [11.8](#).

25.74 System Component

“System Component” means each separable portion of a Deliverable that constitutes a System.

25.75 Systems

“Systems” means systems used by Vendor to provide the Services specified in Schedule [.

25.76 T&M Rates

“T&M Rates” has the meaning given it in Section [8.1](#).

25.77 Term

“Term” means the period during which Vendor shall be obligated to provide the Services, as specified in Section 0.

25.78 Termination Date

“Termination Date” has the meaning given it in Section [11.2](#).

25.79 Termination Notice

“Termination Notice” has the meaning given it in Section [11.2](#).

25.80 Third-Party Software

“Third-Party Software” means the Software provided to the Commonwealth by Vendor through its Subcontractors (all updates, enhancements, customizations, and other improvements thereof). For the purposes of Third-Party Software, Software logoed by International Business Machines’ and its Subsidiaries shall be considered Third-Party Works

25.81 Third-Party Works

“Third-Party Works” means Underlying Works conceived, invented, created, or acquired by a third party, rather than by Vendor (including Third Party Software). For the Items and Services provided by the Commonwealth, for the purposes of Third-Party Works, Underlying Works logoed by International Business Machines’ and its Subsidiaries shall be considered Third-Party Works.

25.82 Underlying Works

“Underlying Works” means tangible and intangible information and material that: (i) had already been conceived, invented, created, developed or acquired by Vendor prior to the Effective Date or (ii) were conceived, invented, created, developed or acquired by Vendor or third parties after the Effective Date, but only to the extent such information and material do not constitute Work Product hereunder. An Underlying Work includes all intermediate and partial versions thereof, including all source code and object code with respect thereto, and all designs, specifications, inventions, discoveries, improvements, materials, program materials, software, flow charts, notes, outlines, lists, compilations, manuscripts, writings, pictorial materials, schematics, other creations, and the like, whether or not patented or patentable or otherwise protectable by law.

25.83 Vendor

“Vendor” has the meaning given it in the preamble to this Agreement.

25.84 Vendor Competitor

“Vendor Competitor” means a Person identified as a Vendor Competitor on Schedule [25.84](#) attached hereto and such Persons’ successors, and any other Persons that may be designated by Vendor from time to time, in a written notice to the Commonwealth, subject to the Commonwealth’s approval, as additional Vendor Competitors and that are engaged, as a substantial and not incidental part of their respective businesses, in providing products to, or performing activities, functions, or services for, their respective customers that are competitive, on greater than an incidental basis, with the products provided, or activities, functions, or services performed, by Vendor for Vendor’s customers (including the Commonwealth), regardless of the locations from which any such products are provided or received, or any such activities, functions, or services performed or utilized.

25.85 Vendor Personnel

“Vendor Personnel” means, at a given time during the Term, Vendor’s Relationship Manager, the Key Personnel, and all other employees of Vendor or of Subcontractors of Vendor who are then assigned or performing responsibilities in connection with providing the Services. An individual falling within such description is a “Vendor Person.” A complete list of Vendor Personnel, including the specific position occupied or function performed by each Vendor Person dedicated to providing the Services, shall be promptly

provided by Vendor at any time, and from time to time, during the Term, upon the reasonable written request of the Commonwealth . Vendor Personnel shall not include Managed Employees.

25.86 Vendor Software

“Vendor Software” means the Software owned or exclusively licensed by Vendor, (including all updates, enhancements, customizations, and other improvements thereof).

25.87 Vendor Works

“Vendor Works” means tangible and intangible information and developments that are owned by the Vendor (including Vendor Software, to the fullest extent of the Vendor’s rights therein), including all intermediate and/or partial versions thereof and all designs, specifications, inventions, discoveries, improvements, materials, program materials, software, flow charts, notes, outlines, lists, compilations, manuscripts, writings, pictorial materials, schematics, other creations, and the like, in any form or media and all Underlying Works..

25.88 VITA

“VITA” means the Virginia Information Technologies Agency, or any successoragency .

25.89 Work Product

“Work Product” means materials newly created by Vendor or a Vendor Subcontractor pursuant to this Agreement that Vendor is obligated to provide to the Commonwealth pursuant to the Agreement, excluding Software. All Work Product constitutes a Deliverable. Each of the Parties acknowledges that, to the extent that Work Product contains Confidential Information of another Party, such Work Product shall be subject to the provisions of Section [16](#) of this Agreement.

[SIGNATURE PAGE FOLLOWS]

The Parties have executed this Agreement as of the Effective Date set forth above.

THE COMMONWEALTH OF VIRGINIA	[NAME OF VENDOR]
By: _____	By: _____
Name: _____	Name: _____
Title: _____	Title: _____